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IN THE

SUPREME COURT

OF

WASHINGTON

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ERRATA

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Vol. 102 Wash.

Page 158, foot of page, for 171 Pac. read 172 Pac.

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 14560. Department Two. June 24, 1918.]

L. A. STEPHENS, *Respondent*, v. MUTUAL LUMBER COMPANY, *Appellant*.[1]

NEGLIGENCE—FIRES—LOSS OF GOODS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. Employees in a logging camp cannot recover of the company for the loss of household goods, destroyed by a fire negligently allowed to spread, where they were experienced woodsmen, knew the danger, and had every opportunity to remove and protect their goods.

SAME—FIRES—NEGLIGENCE—PROXIMATE CAUSE — EVIDENCE — SUFFICIENCY. In an action by an adjoining owner for the loss of property destroyed by a fire starting from sparks from defendant's logging engine, there can be no recovery in the absence of any evidence of negligence in allowing the sparks to escape from the engine or in allowing the fire to spread from the immediate vicinity of the engine; especially where it appeared that there would have been no loss if the wind had not suddenly changed and jumped the fire to plaintiff's premises.

Appeal from a judgment of the superior court for Thurston county, D. F. Wright, J., entered April 6, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Troy & Sturdevant, for appellant.

Wedmark & Grimm, for respondent.

[1]Reported in 173 Pac. 1031.

CHADWICK, J.—This action was brought by respondent to recover damages for the loss of household goods destroyed by fire at the logging camp of the appellant on the 17th day of June, 1916. Respondent sues on his own behalf and on behalf of two others, whose claims he holds by assignment for the purpose of bringing this action. We shall first discuss the claims of respondent and his assignee Withrow.

On the day mentioned, appellant was engaged in its logging operations by means of a donkey engine and cables, which were situate over a ridge and about 1,600 feet south of its camp, which was made up of a bunk house, filing house, oil house, and several crude buildings which had been built by the respondent and were occupied by some of the men with families. The house of plaintiff and the house of Withrow were situate about 300 feet south of the bunk house and along respondent's logging road. In the same group of houses was the house of one Williams. The fire started about 2:30 p. m., about forty to one hundred feet from the donkey engine, and presumably from sparks from the engine. The donkey was equipped with an approved type of spark arrester, and it is conceded by all of the witnesses that no spark arrester will arrest all sparks or prevent fire from escaping from such engines. When the fire started, there was a light breeze from the north. The wind had been in the north for several days. The two men about the donkey undertook to put the fire out by means of a ten-quart bucket which had been provided for that purpose. It is possible that they were assisted by the hook tender—the witnesses are not agreed—but the fire had started in a pile of brush and was very soon beyond their control. They then lent themselves to moving the donkey to a place where the land had been burned over and where they thought it would be safe. The fire continued to burn until the

evening. There were from seventy-five to eighty-three men employed in the camp. They quit work at 5 o'clock in the evening and a part of them went to town on a car provided for that purpose by the company. From eighteen to twenty-five men were kept in the camp to watch the fire. During the afternoon and before 5:30, plaintiff went to his house, prepared his supper and changed his clothes, intending to go to Tenino and thence to Centralia.

The negligence alleged in the complaint is that the appellant negligently permitted the fire to spread. Out of the testimony these facts are prominent and unchallenged: that no spark arrester will absolutely prevent the throwing of fire by an engine; that there is always danger of fire in a logging camp; that the appellant had used such precautions in the operation of its camp as are usually employed by those engaged in the logging business, in that it had, in the springtime and before the woods had become dry and inflammable, burned over an area to the south of its camp where it had previously cut off the timber; that this was a preventive measure and is consistent with reasonable care and prudence. It is also admitted by all concerned that, between the time the fire started, at about 2:30 p. m., and until some time between 5:30 p. m. and 6 p. m., the wind was blowing from the north and away from the camp, and that there was no seeming danger to any of the buildings or personal belongings of any of the men; that, at about that time, the wind suddenly changed from the north to the south; that it was a spirited gale, and that the fire began to spread rapidly to the north, and that it "jumped," to use a word common in the record, from 1,000 to 1,200 feet over the intervening burned area and destroyed the camp, with the exception of possibly one dwelling place.

Neither plaintiff took any precaution to protect his property. Certain witnesses testify that, although the danger was discussed, plaintiff said that he would chance it a little longer. His coplaintiff, Withrow, did take two suitcases and some other property out of his house and put them on the locomotive. When the wind changed, the filer foresaw the danger and buried his saws and a truck that he used about his employment; the men in the bunk house took their goods and protected them from the fire, and Williams, the owner of the property in the third house of the group, of which plaintiff's house was one and Withrow's another, took his property out, put it on a push car and took it away.

Respondent asserts that it was the duty of appellant to protect the property, or to provide means for its safe removal. Granting, for the purpose of the argument, that appellant's foreman should have foreseen the danger and protected or removed the property, it does not follow that respondent is entitled to recover. He and Withrow are experienced woodsmen; they knew the danger of fire; they might have anticipated the danger, and they had every opportunity in point of time to have removed or protected their goods. To allow them to recover would be to say that appellant is bound by one rule of prudence and that they are bound by another, which would be in effect to say that the appellant, under the circumstances of this case, was a guarantor of the safety of their property. Respondent meets this suggestion by saying that there was no means for the removal of the property. It is true that, when he did appreciate the danger—the wind having changed just before 6 o'clock and his house was burned before 7 o'clock—there was no way to remove the goods; but he might have moved them between five o'clock and five-thirty on the "man car" which carried the men, or those of them who went into Tenino, or he

could have employed the push car that Williams had used in the exercise of his prudence, or he could have saved a part at least of his property by using the method employed by the filer and the men in the bunk house. When it was seen that the houses were in danger, appellant's foreman endeavored to save the property. The locomotive was backed down and all of the water in its tank was used in an endeavor to put out the fire; but the trestle ahead of it took fire and the locomotive had to be moved out that it might be saved.

It seems to us that this case, in a nut shell, is that all parties concerned, being experienced in the woods and knowing the danger of fires and that they frequently occur about logging operations, were in no way alarmed and were willing to take a chance, for there was an intervening space of 1,000 feet or more that had been burned over, until by a sudden change of the wind the danger was brought to the door of the camp, and that it was then too late for any of them to do that which prudence would have dictated had the wind been blowing, however slightly, from the south at the time the fire started. There is nothing in the case of *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200, that contradicts our holding in this case. It is true that we held that there is a measure of responsibility on the part of an owner which requires him to use reasonable effort to prevent the spread of a fire upon his premises. But in this case we are prepared to say, as a matter of law, that the owner is not to be charged with a keener judgment and prevision than those who complain of its negligence. The fact that plaintiff was prepared to leave the camp for the week end, had changed his clothes and had his supper in his own house, indicates that he was entirely satisfied, and that, up to and after the time the wind changed, he was content to believe that the fire would continue to

spread away from the camp where it was doing no damage, unless it was to a few fallen logs. After the wind changed and the fire "jumped," there seems to have been no time for the saving of any of the buildings, and those who had property or who were responsible for it were generally concerned in their more immediate affairs.

It is urged that appellant should have kept enough men in camp to control the fire. But the issue cannot be thus narrowed. The real question is whether appellant used ordinary prudence. There is no testimony tending to show that it did not, while there is testimony that 100 or 1,000 men could not have stayed the flames after the sudden change in the wind.

Respondents recovered upon the claim of one Wherrett, who claims damages for the loss of chicken houses and some rails and fence posts which were burned in the evening of the same day. Wherrett's property is situate across the valley and is distant between a half mile and one mile from the camp, and from a quarter to a half mile from the nearest point of the burn. No one testifies that the fire that destroyed Wherrett's property came from the fire in respondent's works, but it is likely that it did. But the conclusion is inevitable that, if it did, it was because of the change in the direction of the wind and the violence of the gale. One who loses property by fire is governed by the established rules of law, and recurring to first principles, if subsequent to the act of the party charged, whether it be rightful in its inception, or wrongful in the sense that it is negligent, a new cause intervenes which of itself is sufficient to stand as the cause of the misfortune, the first act is considered as too remote to sustain a recovery. In logging operations and in the clearing of new lands, it is necessary to build fires and to destroy waste. This cannot be done without a certain hazard

to other property, but the law does not, for that reason, deny the right to maintain fires in the prosecution of legitimate business, nor will it charge one with negligence who fails to put out a fire which is not threatening, when such fire, by reason of some new cause, lodges on the property of another or goes beyond the control of the person who set it out. The law is well stated in *Ryan v. New York Central R. Co.*, 35 N. Y. 210, where it is said:

"To sustain such a claim as the present, and to follow the same to its legitimate consequences, would subject to a liability against which no prudence could guard, and to meet which no private fortune would be adequate. Nearly all fires are caused by negligence, in an extended sense. In a country where wood, coal, gas and oils are universally used, where men are crowded into cities and villages, where servants are employed, and where children find their home in all houses, it is impossible that the most vigilant prudence should guard against the occurrence of accidental or negligent fires. A man may insure his own house or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them. To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society. No community could long exist, under the operation of such a principle. In a commercial country, each man, to some extent, runs the hazard of his neighbor's conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss. To neglect such precaution, and to call upon his neighbor, on whose premises a fire originated, to indemnify him instead, would be to award a punishment quite beyond the offense committed. It is to be considered, also, that if the negligent party is liable to the owner of a remote building thus consumed, he would also be liable to the insurance companies who should pay losses to such remote owners. The principle of subrogation

would entitle the companies to the benefit of every claim held by the party to whom a loss should be paid."

But if the rule were otherwise, respondent has not sustained the Wherrett claim as he made it in the pleadings. He alleges that appellant negligently and carelessly allowed coals and fire to be thrown from the engine, and that he negligently and carelessly permitted the fire to escape from the immediate vicinity of the engine. The testimony wholly failed in these particulars. The fire did not escape from the immediate vicinity of the engine or from the lands owned by appellant, through the negligence of any one. If the fire, being upon appellant's lands, had gradually moved toward the property of Wherrett, so that it could be said that appellant could have reasonably anticipated harm to his property, it would have been incumbent upon it to make a reasonable effort to stay its progress, but we understand the law to be that no man is to be charged with negligence unless it can be said, as a matter of law, upon the facts found, that he might, by the exercise of ordinary prudence, have avoided the injury; but still, if we give to the pleadings the meaning which counsel would now give to his charge of negligence, Wherrett would still have no right to recover.

"We construe both paragraphs of the complaint in this case to mean that the appellant's servants and employees negligently, but nevertheless accidentally, set fire to the station-house adjacent to appellee's hotel building, and that while the station-house was on fire and being thereby consumed, the wind intervened and blew some of the sparks and flames over onto the hotel building, thus communicating the fire also to it, and causing it, with the personal property described, to be also burned up and destroyed.

"As thus construed, neither paragraph of the complaint charged, either in direct terms or in equivalent words, that the destruction of the hotel building was the natural as well as the immediate and proximate

consequence of the burning of the station-house. On the contrary, the fair inference, from the averments in both paragraphs, was, that, if the wind had not intervened as a new and independent agency, the fire would not have extended to and consumed the hotel building and other property connected with it." *Pennsylvania Co. v. Whitlock,* 99 Ind. 16, 26, 50 Am. Rep. 81.

We are convinced, upon a reading of the whole record and due attention to the cases cited, that respondent cannot recover. The case is therefore reversed, and remanded with instructions to the lower court to sustain the motion for a judgment *non obstante.*

MAIN, C. J., HOLCOMB, MOUNT, and MACKINTOSH, JJ., concur.

[No. 14731. Department Two. June 24, 1918.]

C. SCHMITZ, *Appellant,* v. JOSEPH KLEE *et al.,* *Respondents.*[1]

PUBLIC LANDS—PATENTS—BOUNDARIES—SHORE LINES. The government meander of a lake is not a boundary line, and the patent conveys to the actual shore line so as to include a peninsula that was cut off and left outside the meander.

ADVERSE POSSESSION—PRESUMPTIONS. In the absence of proof, it will be presumed that possession was permissive and not adverse to the owners.

SAME—COLOR OF TITLE—DESCRIPTION OF PROPERTY. An instrument conveying "all interest and title" that the grantors "may have in the piece known as the point" in Lake S., cannot operate as color of title since it does not sufficiently describe any property without the aid of parol evidence.

SAME—HOSTILE POSSESSION. An entry is not shown to be hostile and the possession thereunder will therefore be presumed to be permissive, where there was no open assertion of hostile title and it appears that prior to taking possession, upon consultation with the owner, her son-in-law, the occupant was advised that she could live

[1]Reported in 173 Pac. 1026.

on the land as long as she wished and during the winters she spent a large part of her time with her daughter and son-in-law on the adjoining tract.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered September 17, 1917, upon findings in favor of the defendants, in an action to quiet title, tried to the court. Affirmed.

E. B. Brockway and *Michael Dowd,* for appellant.

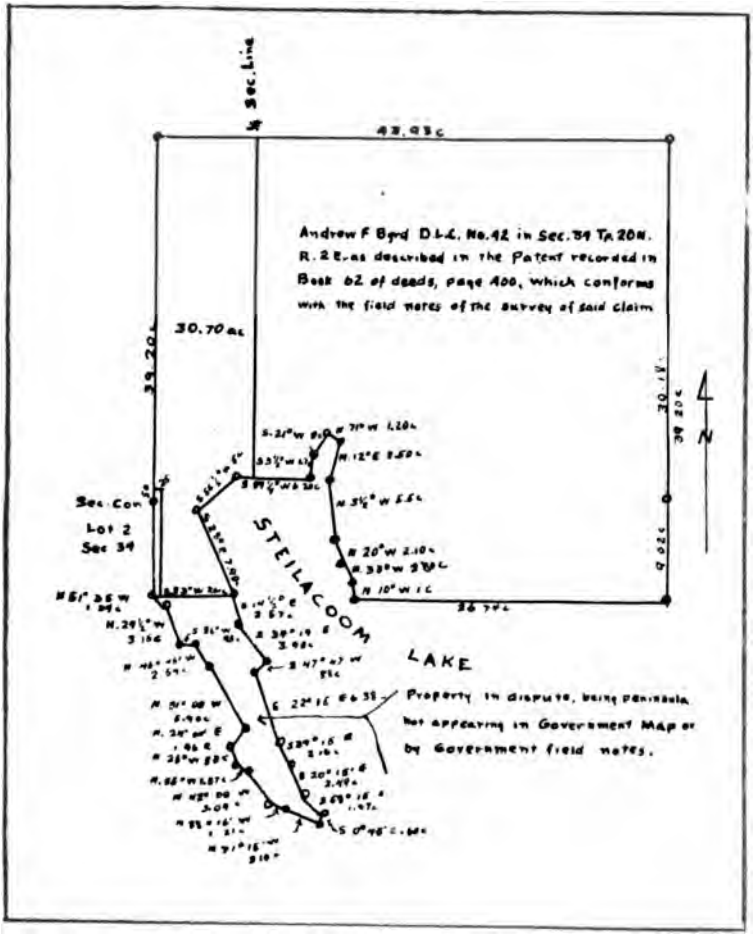
Fitch, Jacobs & Arntson, for respondents.

HOLCOMB, J.—Andrew F. Byrd entered and filed upon a donation claim in section 34, township 20, range 2 east, W. M. Before patent issued, Mr. Byrd died, and in the probate of his estate the claim was sold and described as,

"A. F. Byrd's donation land claim, situated in Pierce county, W. T., and particularly described and bounded as follows: Beginning at a stake standing on the prairie northwesterly of the mills and dwelling house situated on said claim and running thence south 160 rods to a lake; thence east 160 rods to a stake near a white oak tree; thence north 160 rods; thence west 160 rods to the place of beginning; the same being the donation land claim described in the notification No. 1076, now on file in the office of the registrar of the land office of Washington Territory, at Olympia, and contains 160 acres of ground, more or less."

This description would cut off a peninsula (the property in dispute), extending south from the southern boundary into Lake Steilacoom. Defendants trace their chain of alleged title to this peninsula through the above description. The government made a meander survey of the shore of the lake which also cut off the peninsula, leaving the peninsula unsurveyed ground as far as appears. In 1871, the United States government issued a patent to the heirs at law of Andrew F. Byrd, deceased, describing the claim by metes and

bounds, and also referring to it as notification No. 1076, claim No. 42. The exact description contained in the notification certificate and claim No. 42 nowhere appears in the record, unless we may presume it to be the same as contained in the patent. A plat of the donation claim and the disputed peninsula is as follows:


Sec. Line
43.43 c
Andrew F Byrd D.L.C. No. 42 in Sec. 34 Tp. 20N.
R. 2 E. as described in the Patent recorded in
Book 62 of deeds, page 400, which conforms
with the field notes of the survey of said claim
30.70 ac
39.20 c
Sec. Cor
Lot 2
Sec 34
STEILACOOM
LAKE
Property in dispute, being peninsula
not appearing in Government Map or
by Government field notes.
N

In 1890, Frederick Meyer, Frederick Nachtsheim, and Joseph Klee, owners of the Andrew F. Byrd do-

nation claim, quitclaimed to the United States for the purpose of having the patent of 1871 canceled and a corrected patent of the claim issued. In this corrected patent of 1890, the United States issued it to the heirs at law of Andrew F. Byrd, deceased, described as notification No. 1076, claim No. 42, being bounded and described as follows, to wit:

"Beginning at a point four chains and 65 links west of the S. E. corner of the N. E. ¼ Sec. 34, and running thence north 30 chains and 18 links, thence west 43 chains and 93 links, thence south 39 chains and 20 links to a point on Lake Steilacoom, thence north 83° east 6 chains, thence north 28° west 7 chains and 90 links; thence north 56° 30′ east 5 chains, thence north 89° 15′ east 6 chains and 20 links; thence north 3° 30′ east 1 ch. 70 lks; thence north 21° east 2 chains; thence south 71° east 1 ch. 20 lks; thence south 12° west 3 ch. 50 lks; thence south 3° 30′ east 5 ch. 50 lks; thence south 20° east 2 ch. 10 lks; thence south 33° east 2 ch. 30 lks; thence south 10° east 1 ch; thence east 26 ch. 74 lks. and thence north 9 ch. 2 lks. to place of beginning, containing 158 79-100 acres."

It is apparent, in comparing these calls with the foregoing plat, that this description does not include the disputed peninsula. In 1904, by subsequent conveyance, respondents claim to be the sole owners of that portion of the Byrd donation claim containing 30.70 acres, bounding the disputed peninsula on the north.

Respondents are the daughter and the son-in-law of appellant and seem to have been in friendly relation until this suit. Prior to 1900, appellant lived about seven years without paying rent, in a little house called the "Mill House," situated on the Byrd donation claim, having been moved there by respondent Joseph Klee. About 1885 or 1888, one Meyers became the owner of a portion of the Byrd donation claim which did not bound the disputed peninsula; nevertheless he went into pos-

session of the peninsula, built a house (which was occupied by his daughter), and fenced off the peninsula approximately on the line of the meander call. Meyers remained in possession until he sold to one Hill, who sold to appellant by the following instrument:

"Tacoma, Washington, May 5, 1900.

"This agreement made this day and year, May 5, 1900, Edward C. Hill and wife of the first part and C. Schmitz of the second part; that the parties of the first part for and in consideration of $100 paid by the party of the second part, or Mrs. C. Smith, the receipt whereof is hereby acknowledged, do hereby remise, release and forever sell unto the party of the second part, the following improvements and all interest and title the parties of the first part may have in the piece, known as the point in Steilacoom Lake; also one four-room house, one barn, chicken house, well and all fences thereon."

Appellant, a widow, with her son, Adolph, immediately went into possession of the peninsula, and the respondents at no time prior to 1916 attempted to oust either Meyers, Hill, or appellant. Prior to the purchase from Hill, appellant consulted Joseph Klee, one of the respondents, in regard to the purchase, and she was advised by him that she could live there as long as she wished, or as long as she lived, as far as he was concerned. In 1905, appellant told Joseph Klee that one Pease had offered her $500 for the place; whereupon he told her that he would give her the same for it. In his testimony he stated it was for the improvements and to get her off the place.

It is not shown that any one paid taxes on this disputed peninsula. During the summer of 1916, Klee was informed by some government officers that he owned the peninsula by virtue of the description in the patent. He told Adolph Schmitz that he would have to pay rent for his cattle running on the place.

Soon thereafter Klee built a house on the peninsula. Appellant commenced this action to establish her title. The trial court held that appellant's possession was subservient to respondents and really their possession, and not adverse to them. Upon this ground, judgment was entered quieting title in respondents.

Appellant assigns as errors: The refusal of the court to give findings of fact Nos. 1 to 14, and conclusions of law Nos. 1 to 3, proposed by plaintiff; the giving by the court of findings of fact Nos. 1, 3, 4, 5, 8, 9, and 10, and conclusions of law Nos. 1 to 6, proposed by defendants; and the entry by the court of judgment herein dismissing plaintiff's action, holding that her claim was not good and not adverse, and quieting title against any claim of the plaintiff. These assignments, involving the question of title by adverse possession, or otherwise, of the disputed peninsula, may be discussed *in toto*.

Appellant contends that, under the United States laws governing donation claims, the probate proceeding (being prior to the issuance of patent) was ineffectual to pass title or change the status of the Byrd donation claim, and that the subsequent issuance of the patent by the United States to the heirs of Andrew F. Byrd vested title in such "heirs" rather than in the grantees of his administrator; and that for this reason, if for no other, the legal title (except as affected by adverse possession) still remains in the Byrd heirs.

If we should hold that appellant's contention is correct, then her claim of adverse possession against the heirs of Andrew F. Byrd would have foundation. The quitclaim deed by Klee and Nachtsheim to the government shows that it was given for the purpose of correcting a description in the former patent. It is customary for the United States government to issue its

patent to the heirs of a deceased entryman and leave it to the state courts to determine who are the heirs. It cannot be said that the granting of the patents to the heirs of Andrew F. Byrd, deceased, in these instances deprived the respondents of that portion of the donation claim bounding the peninsula on the north. Although the patents, by their description, do not specifically include the disputed peninsula, it is plain that the land on the north adjoining this peninsula becomes the upland abutting the same. If the peninsula is not a part of the donation claim it remains government land which cannot be acquired by adverse possession. *Slaght v. Northern Pac. R. Co.*, 39 Wash. 576, 81 Pac. 1062. The original meander line cut off the peninsula, leaving it outside the meander. It is the policy of the government not to assert title to such tracts, and to hold that the title passes to the abutting owners as though the land were included within the meander line. *Hardin v. Jordan*, 140 U. S. 371; *Mitchell v. Smale*, 140 U. S. 406. In the last case, Justice Bradley, writing the opinion, said:

"It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary. *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Jefferis v. East Omaha Land Co.*, 134 U. S. 178; *Middleton v. Pritchard*, 3 Scam. 510; *Canal Trustees v. Haven*, 5 Gilm. 548, 558; *Houck v. Yates*, 82 Ill. 179; *Fuller v. Dauphin*, 124 Ill. 542; *Boorman v. Sunnuchs*, 42 Wis. 235; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 403; *Clute v. Fisher*, 65 Mich. 48; *Ridgeway v. Ludlow*, 58 Ind. 249; *Kraut v. Crawford*, 18 Iowa 549; *Forsyth v. Smale*, 7 Bissell, 201. The case last cited, *Forsyth v. Smale*, presented the very case of a tongue of land projecting beyond the meander line into Lake George, a small lake in Indiana, situated to the east of Wolf lake and connected therewith. It is cited and commented on in the opinion in *Hardin v. Jordan*. In conclusion,

our view on this part of the case is that the patent to De Witt conveyed, and the plaintiff is entitled to, all of the fractional S. W. quarter of section 20 from its northern boundary line extending southwardly to the actual water line of the lake, wherever that may be, with the riparian rights incident to such position."

Appellant contends that Meyers, Hill and she each held adversely, and that she at least held under claim of right and color of title. There is no proof that Meyers and Hill held adversely, and it will be presumed that it was permissive and the possession of the owners. *Peoples Sav. Bank v. Bufford,* 90 Wash. 204, 155 Pac. 1068; *Skansi v. Novak,* 84 Wash. 39, 146 Pac. 160.

Was appellant's possession adverse or held under claim of right and color of title? She testified that she had a paper from Hill (the instrument above set forth) but did not know what was in it, and that Hill did not say that he owned the property. An instrument, in order to operate as color of title, must purport to convey title to the grantee or to those with whom he is in privity, and must describe and purport to convey the land in controversy; it cannot be aided by parol evidence. *Converse v. Calumet River R. Co.,* 195 Ill. 204, 62 N. E. 887. The instrument which appellant received from Hill does not purport to grant any described property except the interest and title the first party may have in the piece known as the point in Steilacoom lake, which would have to be aided by parol evidence as to the definite piece intended to be conveyed. We cannot hold that this instrument is color of title.

Has appellant shown that her entry as against respondents was hostile? She spent a large part of her time, particularly the winters, at respondents' home. There must be some open assertion of hostile title to the property, notice of which must be brought home to

the owners of the land. *Collins v. Colleran,* 86 Minn. 199, 90 N. Y. 364.

In *Dunham v. Townsend,* 118 N. Y. 281, 23 N. E. 367, it was said:

"During her son's occupation of this part of the farm, Mrs. McGowan lived at her homestead at McGowan's Pass, . . . She visited her son frequently at the dwelling-house on the farm, and there was constant communication between them. The objection is made that possession of the farm by Mrs. McGowan was not shown. We think the evidence sufficiently established possession of the land in Mrs. McGowan. The relations shown to exist between the mother and her son are entirely inconsistent with the claim that the son's possession was adverse to his mother's title, and show that he held under her and subordinate to her rights."

The entry must be hostile or it will be presumed permissive. *Bellingham Bay Land Co. v. Dibble,* 4 Wash. 764, 31 Pac. 30; *Blake v. Shriver,* 27 Wash. 593, 68 Pac. 330; *Port Townsend v. Lewis,* 34 Wash. 413, 75 Pac. 982; *Yesler Estate v. Holmes,* 39 Wash. 34, 80 Pac. 851; *Delacey v. Commercial Trust Co.,* 51 Wash. 542, 99 Pac. 574, 130 Am. St. 1112; *McNaught-Collins Imp. Co. v. May,* 52 Wash. 632, 101 Pac. 237; *Northern Pac. R. Co. v. Devine,* 53 Wash. 241, 101 Pac. 841; *Skansi v. Novak,* 84 Wash. 39, 146 Pac. 160; *O'Donnell v. McCool,* 89 Wash. 537, 154 Pac. 1090; *Peoples Sav. Bank v. Bufford,* 90 Wash. 204, 155 Pac. 1068.

Although appellant was in open, notorious possession for the statutory period, it does not appear that she was holding adversely to respondents, no matter whether she intended to hold so against the Byrd heirs or the government.

We think the trial court was right in his judgment, and the same will be affirmed.

MAIN, C. J., CHADWICK, and MOUNT, JJ., concur.

[No. 14660. Department One. June 27, 1918.]

HORSTMANN COMPANY, *Respondent*, v. S. K. WATERMAN, *Appellant*.[1]

GUARANTY—CONTRACTS—LIABILITY TO THIRD PERSONS—WANT OF PRIVITY. While the seller of corporate stock, who retained a portion of the assets and agreed with the buyer and the corporation to pay all the debts of the corporation, was concededly liable directly to the creditors, a guaranty contract whereby a third person agreed with the corporation and the buyer to guarantee the seller's performance of his agreement does not render the guarantor liable to the creditors, although they are indirectly interested in its performance; since the guaranty was intended only for the benefit of the promisees, and there was no privity with creditors, and the doctrine of liability without privity is not to be extended to new and doubtful cases.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 9, 1917, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

Reed & Hardman, for appellant.

E. L. Skeel (*Roberts, Wilson & Skeel*, of counsel), for respondent.

PARKER, J.—The plaintiff, John Horstmann Company, a corporation, seeks recovery from the defendant, S. K. Waterman, balances due upon the purchase price of goods sold and delivered by it and its assignor to the Lithocrete Company, a corporation; recovery being sought upon the theory that the defendant has become liable to the plaintiff for the payment of such balances under her guaranty contract. Trial in the superior court for King county without a jury resulted in findings and judgment awarding to the

[1]Reported in 173 Pac. 733.

plaintiff recovery as prayed for, from which the defendant has appealed to this court.

Prior to and on November 27, 1913, H. S. Waterman was the owner of all of the capital stock of the Lithocrete Company, except sufficient shares thereof to enable others to hold office in the company. On that day he sold all of his stock in the company to A. J. Weiffenbach, the then president of the company, at the same time entering into a written contract with Weiffenbach and the company as follows:

"This contract made this November 27, 1913, by and between H. S. Waterman, first party, A. J. Weiffenbach, second party, and the Lithocrete Company, a corporation of the state of Washington, third party.

"Witnesseth, that whereas Waterman has this day sold and transferred to Weiffenbach all of the capital stock of the Lithocrete Company, for the sum of $3,500, retaining however certain assets of the company below mentioned.

"Now therefore, in consideration of the premises and of the mutual promises hereinafter contained, the parties hereto agree as follows:

"(1) It is agreed by all the parties hereto that Waterman shall retain as his own individual property the following property heretofore owned by the company; all office furniture and office equipment, all the bills and accounts receivable, claims and choses in action of the company, and ten tons of Styrian Magnesite; and the company agrees to execute and deliver to Waterman, upon demand, a proper written assignment of any or all of said bills and accounts receivable, claims and choses in action.

"(2) Said Waterman agrees that he will within one year from the date hereof pay or settle all of the bills and accounts payable of said company and all obligations and debts of said company now outstanding, except any commissions owing by the company on account of unexecuted contracts for laying Lithocrete which have been entered into by said company, which commission the company is to pay; and said Water-

man agrees to indemnify said company against the payment of any and all debts of the company contracted prior to this date, with the exception above noted, and to reimburse the company for all costs, attorneys' fees and damages which it may incur or suffer by reason of any claim or action taken against it based on any existing debt or obligation of the company. . . .

"(5) Said Waterman agrees not to engage directly or indirectly in the business of manufacturing, selling or laying any composition flooring or similar substance in the state of Washington for a period of five (5) years from the date hereof.

"(Signed) H. S. Waterman,
"By A. J. Weiffenbach, Pres.
"A. J. Weiffenbach,
"Lithocrete Company,
"Howard Waterman, Secy."

At the same time, to secure the performance of this contract by H. S. Waterman, appellant entered into a written contract with Weiffenbach and the company as follows:

"This contract made this November 27, 1913, by and between the Lithocrete Company, a corporation of the state of Washington, and A. J. Weiffenbach, first parties, and S. K. Waterman, second party.

"Witnesseth, that whereas, at the time of making this contract, A. J. Weiffenbach is about to purchase from H. S. Waterman the capital stock of the Lithocrete Company.

"Now therefore, in consideration of the first parties hereto entering into a certain contract with H. S. Waterman, a copy of which is hereto attached, the second party guarantees the performance by H. S. Waterman of all of the conditions of said contract to be performed by him, and in particular guarantees the payment or settlement by H. S. Waterman within one year from this date of all the debts and obligations of said Lithocrete Company now existing, except the commissions on unexecuted contracts of said company.

"The second party further agrees to indemnify and save harmless the first parties hereto against all claims based on existing debts or obligations of said company, and against all damages, costs and attorneys' fees which first parties may suffer or incur on account of such claims.

"(Signed) A. J. Weiffenbach,
"S. K. Waterman,
"Lithocrete Company,
"By A. J. Weiffenbach, President.
"Howard Waterman, Secretary."

At the time of entering into these contracts, the Lithocrete Company was indebted to respondent and its assignor for goods sold and delivered by them to it some time prior thereto, for which indebtedness the judgment here appealed from was rendered against appellant.

It is contended in behalf of appellant that her guaranty contract was not made for the benefit of respondent, but for the sole benefit of the Lithocrete Company and Weiffenbach; that no privity of contract was thereby created between her and respondent, and that, therefore, respondent has no right of recovery against her. There is thus presented the much discussed question, concerning which the authorities are seemingly quite out of harmony, as to the right of a third person to recover upon a contract the performance of which by the obligor will result in benefit to such third person. It is conceded by counsel for appellant that the exceptions to the general rule that only parties to a contract can sue thereon would enable respondent to recover against H. S. Waterman under his contract with the Lithocrete Company and Weiffenbach, because of the express promise of H. S. Waterman to pay the existing debts of the company, and the taking over by him of a considerable portion of the property of the company. We are to remember, however, that ap-

pellant, S. K. Waterman, is one step further removed from respondent than H. S. Waterman; that she has only guaranteed to the Lithocrete Company and Weiffenbach the performance by H. S. Waterman of his promise to pay the indebtedness of the Lithocrete Company; that she has not promised unconditionally to pay such debts, but her promise, in effect, goes no further than that she will pay those debts if H. S. Waterman does not pay them; and that she has not received, under her guaranty contract, any property or funds which respondent had a right to look to for the satisfaction of its claims against the Lithocrete Company.

In *Second Nat. Bank v. Grand Lodge,* 98 U. S. 123, Justice Strong, speaking for the supreme court of the United States, said:

"The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation) he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue."

In *Washburn v. Interstate Investment Co.*, 26 Ore. 436, 36 Pac. 533, 38 Pac. 620, there was under consideration the claimed right of the plaintiff to recover upon a contract to which he was not a party, wherein the defendant stipulated with the Boston Shoe & Leather Company, which was indebted to the plaintiff and others, that it, the defendant, should, within thirty days, pay and discharge such indebtedness, and also make advances necessary to enable the leather company to carry on its business for a period of four months, the amount to be so paid and advanced not to exceed a named sum, the defendant thereafter to receive therefor certain shares of the capital stock of the leather company. It was held that the creditors of the leather company could not recover from the defendant upon the contract, for want of privity, and because it was not made for their benefit. In so holding, Chief Justice Bean, speaking for the court, said:

"The prevailing doctrine in this country undoubtedly is that, where one person, as a consideration or part consideration for an executed contract, promises another, for a consideration moving from him, to pay or discharge some legal obligation or debt due from such other to a third person, the latter, although a stranger to the consideration, and not an immediate party to the contract, may maintain an action thereon, if it was made directly and primarily for his benefit. . . . After a somewhat exhaustive examination of the question, we have found no case which has gone so far as to hold that such action can be maintained on an executory contract by which one person promises to advance his own money to pay the debts of another, but, on the contrary, the authorities deny the application of the rule to such a contract. . . .

"Where one person receives a fund or property from another, and instead of paying him therefor is allowed to retain the consideration under an agreement to pay it to the creditors of the other party; or when it is agreed between the parties to the contract,

there being a valuable consideration therefor, that the promisor may discharge his debt or liability to the promisee by paying it to some third person, to whom the promisee owes some legal duty or obligation, it would be just and proper that such third party should have the right to maintain an action on the contract in his own name. But this is on the theory that the contract being for his direct benefit the law invests him with a privity in respect thereto by reason of his interest, and the promisor, in performing the contract, is doing nothing more than to discharge his own debt or obligation in accordance with his agreement. In such case the amount which the promisor agrees to pay is his own debt or obligation, which, by an arrangement with the promisee, he is to pay or discharge in a particular manner; and the parties having by their contract thus treated the third party as primarily interested in its performance, they have recognized him as privy in fact to the consideration and contract, and therefore there can be no hardship in allowing him to enforce it by an action in his own name, as the parties to the contract contemplated. But where there is no such fund, debt, or obligation in the hands of or owing from the promisor, but only an executory contract by one person to advance his own money to pay the debts of another, who is a party to neither the contract nor consideration, it is difficult to see upon what principle the doctrine can be applied. In such case the contract is not made for the direct benefit of the creditor, but of the promisee, to enable him to obtain money with which to discharge his liability, and, if enforcible at all, it is enforcible by him. The creditors are, of course, indirectly interested in its performance, for, if the contract is complied with, their claims will be paid, and this may be said of any executory contract whereby a debtor expects to receive money with which to pay his debts; but it has never been held, to our knowledge, that such an interest is sufficient to entitle a stranger to maintain an action to enforce the stipulations of the contract."

Our own early decisions may not be wholly harmonious upon the question of the right of a party to recover

upon a contract to which he is not a party, but the following later decisions, we think, call for the conclusion, in harmony with the decisions above quoted from, that the guaranty contract of S. K. Waterman, entered into by her with Weiffenbach and the Lithocrete Company, was not intended for the benefit of respondent or other creditors of that company, but was for the exclusive benefit of Weiffenbach and the Lithocrete Company, and that, therefore, respondent cannot recover thereon, though it would be benefited by the performance of the obligations of S. K. Waterman thereunder: *Spokane Merchants Ass'n v. Pacific Surety Co.*, 86 Wash. 489, 150 Pac. 1054; *Rust v. United States Fidelity & Guaranty Co.*, 87 Wash. 95, 151 Pac. 248; *Dupont De Nemours Powder Co. v. National Surety Co.*, 90 Wash. 227, 155 Pac. 1050. Among other decisions supporting our conclusion we note: *American Exchange Nat. Bank v. Northern Pac. R. Co.*, 76 Fed. 130; *German State Bank v. Northwestern Water & Light Co.*, 104 Iowa 717, 74 N. W. 685; *Sweeney v. Houston*, 243 Pa. St. 542, 90 Atl. 347, L. R. A. 1915A 779; *Montgomery v. Rief*, 15 Utah 495, 50 Pac. 623; *Wilson v. Shea*, 29 Cal. App. 788, 157 Pac. 543.

The two last cited cases show the disposition of the courts not to extend the doctrine here contended for by counsel for respondent to new and doubtful cases, and also to resolve doubts as to the intent of the parties executing a contract, against third parties claiming under it.

Contention is made in appellant's behalf that, in any event, respondent's cause of action, if any it has, is barred by the statute of limitations. In view of our conclusion upon the question above discussed, it becomes unnecessary to decide as to whether or not the bar of the statute would be effective as against re-

spondent, should it be held to have a good cause of action as claimed.

The judgment is reversed and the action dismissed.

MAIN, C. J., MITCHELL, and TOLMAN, JJ., concur.

[No. 14663. Department One. June 27, 1918.]

KAREN KAHN, *Respondent*, v. AKBAR KAHN, *Appellant*.[1]

APPEAL—DECISIONS APPEALABLE—MOTION TO REOPEN. An order denying a motion to reopen a case for further testimony is not appealable as a final judgment.

APPEAL—RECORD—STATEMENT OF FACTS—CERTIFICATE. Upon appeal from a final judgment, an assignment of error in refusing upon motion supported by affidavit to reopen the case for further testimony can be reviewed only upon a statement of facts certified to contain all the evidence upon the portion of the judgment appealed from, and a statement certified to contain a portion of the record is insufficient.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered June 1, 1917, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Affirmed.

H. M. Dalton, for appellant.

MITCHELL, J.—In a contested divorce case, upon trial and proper findings, judgment was entered June 1, 1917, granting plaintiff, respondent, a divorce, and, among other things, awarding to her the custody of two minor children and an allowance for their support. On the same day, prior to judgment, appellant filed in the cause a motion and affidavit to reopen the case for further testimony, which motion was denied on that day. Appeal is taken from only that portion of the

[1]Reported in 173 Pac. 747.

judgment awarding the children to respondent and providing for their support; and also from the order of the court refusing the application to reopen the case.

The sole assignment of error is that the trial court erred in denying the motion to reopen the case for further testimony. There is no statement of facts. The order denying the motion is not appealable because not final. True, an appeal from the judgment brings up for review all prior orders made in the cause, but the affidavit supporting the motion presents issues of fact which may be considered here only upon a properly certified record showing all the evidence in the cause, at least upon that portion of the judgment appealed from. Counsel claims relief from the force of this rule because of an original certificate of the trial judge to copies of the motion and affidavit as they appear in the transcript certified by the clerk, which, however, is insufficient because relating only to an intermediate step in the case involving matters of fact; and for the further reason that the certificate purports to cover only a part of the record, and is as follows:

"That the matters embodied in the foregoing affidavit are matters occurring in said cause and are a *portion* of the record herein;

"That said affidavit, in support of the motion of the defendant to reopen said cause and permit the defendant herein to introduce testimony on his behalf, was introduced together with said motion *prior* to the time of signing the findings of fact and conclusions of law, and the making, signing and filing of the formal decree in said cause, and that the same was before this court and said motion denied by this court *prior* to the time of the making and entering of said findings of fact and conclusions of law, and *prior* to the time of the making, signing and entering of said decree."

The cases of *Ingersoll v. Cudihee,* 96 Wash. 515, 165 Pac. 375; *Taylor v. Andres,* 83 Wash. 684, 145 Pac.

991; and *Agens v. Powell*, 79 Wash. 131, 139 Pac. 873, clearly suggest no error in the present case.

Judgment affirmed.

MAIN, C. J., FULLERTON, PARKER, and TOLMAN, JJ., concur.

[No. 14719. Department One. June 27, 1918.]

WEST & WHEELER, *Respondent*, v. DIEDRICH DIERSSEN, *Appellant*.[1]

BROKERS — ACTIONS FOR COMMISSIONS — EVIDENCE — SUFFICIENCY. In an action for a commission, by a broker who procured a lender, able and willing to make the loan, it was not necessary to show termination of a timber cruise which the borrower had started to satisfy the lender, who accepted in advance of the cruise.

Appeal from a judgment of the superior court for King county, Pemberton, J., entered December 14, 1917, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

E. H. Guie, for appellant.

Byers & Byers, for respondent.

MITCHELL, J.—Diedrich Dierssen, appellant, engaged respondent to procure for him a loan on his timbered land at a commission agreed on, appellant agreeing to pay the expenses of a cruise mainly to ascertain if there had been any fire or trespass since a former reliable cruise of the timber. He was in a hurry to get the loan, and having in mind other prospective lenders, reserved the right to borrow from another, in which event there should be no liability to respondent other than whatever expense might have been incurred on account of a cruise, provided he notified respondent of

[1]Reported in 173 Pac. 739.

having made other arrangements before respondent had procured a lender. Respondent rather promptly procured a lender who was ready, able and willing to lend the money and who had actually been on the land. Appellant was so notified and, on request, delivered abstracts of title to respondent, who promptly delivered them to the lender. About this time, but subsequent to the delivery of the abstracts, appellant called off the cruiser, having procured a loan from another. Appellant refused to pay any commission; hence this suit, tried without the help of a jury, resulting in findings and judgment in favor of respondent for the commission and $30, cost and expenses of a cruiser.

Appellant admitted in his answer the $30 liability for expenses of the cruiser, and brought that much money into court. There is a dispute as to whether a lender who was able, ready and willing was procured, but we are satisfied the proof is with the respondent, and see no useful purpose in discussing the evidence in this respect.

Another contention, included in the general one just referred to, is that, as the cruise had not been finished, it cannot be said the lender was ready and willing, because there was a way open for him to withdraw. It will be observed that this is not a case in which the deal is to be deferred at the demand or request of the lender until the completion of a cruise he insists on, but rather one in which the lender accepts after going on the land and during the progress of the cruise, which was a part of the proposition of, and at the expense of, the borrower. Again, appellant claims he notified respondent of his making the other deal before respondent had completed its services; but the answer to this is that the abstracts were returned to appellant by the prospective lender that respondent had procured.

Essentially, this cause presents mostly matters of fact, and the proof shows they preponderate in favor of the judgment, which is hereby affirmed.

MAIN, C. J., FULLERTON, TOLMAN, and PARKER, JJ., concur.

[No. 14752. Department One. June 27, 1918.]

A. N. WALQUIST, *Respondent*, v. CONRAD JOHNSON *et al.*, *Appellants*.[1]

FRAUD — MEANS OF KNOWLEDGE — EVIDENCE — SUFFICIENCY. The evidence does not sustain an action for deceit in a sale of an acre and a half of land, in regard to the location of a highway and ravine, where the vendee had purchased and spent two summers upon adjoining land, knew the location of the two tracts and was perfectly familiar with the surroundings, and the highway was slashed and plainly visible, and there was no evidence of misrepresentations as to the ravine.

COVENANTS—WARRANTY—HIGHWAY AS "INCUMBRANCE." A public highway is not an incumbrance sustaining an action for breach of covenant of warranty.

Appeal from a judgment of the superior court for King county, Pemberton, J., entered November 27, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Reversed.

Saunders & Nelson, for appellants.

Baxter & Jones, for respondent.

FULLERTON, J.—The appellants, on June 16, 1915, conveyed to respondent a tract of land in King county, Washington, described as follows:

"Beginning at a meander post between sections nineteen (19) and thirty (30), township twenty-four (24) north of range five (5), east of the Willamette Meridian; thence west on the section line between said sec-

[1]Reported in 173 Pac. 735.

tions nineteen (19) and thirty (30) twelve hundred feet (1200 ft.), the true point of beginning; thence south three hundred feet (300 ft.); thence west two hundred and thirty feet (230 ft.); thence north three hundred feet (300 ft.); thence east two hundred and twenty-four feet (224 ft.) to the point of beginning."

This tract abutted on the east boundary of a parcel of land which the respondent had purchased two years prior from the same grantors, and both parcels were sold to the respondent according to a plat showing the lines and relative positions of the two tracts. Two years following its purchase, the respondent demanded a rescission of the sale on the ground that one-third of the land was taken by a county highway, and because he understood at the time of purchase that the tract lay 150 feet farther north, thus avoiding a ravine upon the land as actually purchased by him. On the refusal of the appellants to rescind, he brought an action for damages, alleging that the deed contained a covenant of warranty for one and one-half acres, but that the tract contained only one acre; that appellants, at the time of purchase, misrepresented the south line as 150 feet further north and beyond a certain ravine, thereby falsely inducing the respondent to buy the premises; that the land was of no value, and that he, relying upon such representations, paid appellants $300, for which sum he demands judgment. The complaint also recites that the respondent tendered a deed of the land back to the appellants with a demand for the repayment of the purchase price, but that appellants refused to accept the deed or pay back said sum of $300. The tender, however, was not kept good, nor was the action in form one for rescission.

On the trial of the action before a jury, a verdict was returned in behalf of respondent for $300. From the judgment on such verdict, this appeal is prosecuted.

Although a number of errors are assigned, the principal reliance of appellants is upon the insufficiency of the evidence to sustain the judgment. Our determination of that assignment renders unnecessary a consideration of the other contentions of the appellants. This contention was presented in the trial court by a motion for nonsuit, by a motion for a directed verdict, and by a motion for judgment notwithstanding the verdict.

To our minds, the evidence presented nothing warranting a recovery. At the time of the purchase, the respondent had before him a correct plat of the land, showing its location and the manner in which the tract purchased abutted upon his adjoining land. He had spent two summers on the adjoining land, knew the relation the land purchased bore to the other land, and was perfectly familiar with the surroundings. His claim of misrepresentations is that a third of the land purchased was occupied by a public highway which he thought ran in another direction, and that a deep ravine ran through it which he thought was on another tract. There is no evidence at all that the appellant misrepresented the location of the ravine. The evidence of misrepresentation as to the highway is that the appellant, while standing with the respondent on the line of the highway, stated that it ran in a direct course, whereas it, in fact, deflected from that course onto the purchased tract. But the evidence showed that the highway was slashed of its growth of timber and brush at the time, and that its course was as plainly visible to the respondent as it was to the appellant. More than this, the statement was made nearly a year prior to the purchase, before the purchase had been broached between them, and when the parties were casually upon the land. It may be that the respondent was mistaken as to the course of the highway and relied in some degree on the appellant's opinion as to

the course of the road; but it is manifest that the appellant was only stating his general understanding of its course, the incorrectness of which was as apparent to the respondent as it was to the appellant. Such a statement, made under such circumstances, clearly cannot be invoked to support an action of deceit. It was neither actual nor legal fraud. *Conta v. Corgiat,* 74 Wash. 28, 132 Pac. 746; *Meyer v. Maxey,* 92 Wash. 73, 158 Pac. 995; *Hegberg v. Tripp,* 99 Wash. 298, 169 Pac. 822.

Nor can the recovery be supported upon the theory that there was a breach of warranty because a public highway extended over the land. We have adopted the rule, supported by a majority of the cases, that a public highway is not an incumbrance warranting a purchaser to claim a breach of a covenant of warranty, even though there may be no express exception of the highway from the covenant. *Hoyt v. Rothe,* 95 Wash. 369, 163 Pac. 925.

The judgment is reversed and the cause remanded with instructions to enter a judgment for the appellants, defendants below.

MAIN, C. J., PARKER, TOLMAN, and MITCHELL, JJ., concur.

[No. 14829. Department One. June 27, 1918.]

GEORGE M. TERRILL, *Appellant*, v. D. S. FOTHERINGHAM, *as Executor etc., Respondent.*[1]

DEPOSITIONS—EXPERTS — NUMBER OF WITNESSES — DISCRETION. It is within the discretion of the trial court to limit the number of medical experts whose depositions were to be taken to prove the value of medical services.

EVIDENCE—EXPERTS—VALUE OF SERVICES—EVIDENCE — ADMISSIBILITY. Upon an issue as to the value of medical services performed in San Francisco, it is admissible for medical experts of Seattle to testify as to the care and attention required in a disease known of all physicians.

APPEAL—REVIEW—HARMLESS ERROR. In an action for medical services tried to the court, error in allowing witnesses to testify as to the value is harmless.

Appeal by plaintiff from a judgment of the superior court for King county, Ronald, J., entered January 7, 1918, upon findings in favor of the plaintiff, in an action for services performed by a physician, tried to the court. Affirmed.

J. Henry Denning, C. Dell Floyd, and *Warren H. Lewis,* for appellant.

Wettrick & Wettrick, for respondent.

MITCHELL, J.—William Allen Mears, deceased, was a resident of Seattle, and during his last illness went to San Francisco, where he received the professional services of his friend, Dr. George M. Terrill. The doctor sued the executor of the Mears' estate on account of services, which consisted not of unit prices, but an aggregate sum, and not being satisfied with the amount the trial court allowed, appeals. The trial was without

[1]Reported in 173 Pac. 748.

a jury, and there is no dispute as to the facts or findings, except as to the value of the services.

Appellant applied for a commission to take the depositions of five physicians in San Francisco as to the value of the services. The court refused except for three, other than appellant, and this is assigned as error. It is apparent that this is a matter within the discretion of the trial court with reference to something that is neither exact nor scientific. It possesses no element of knowledge, but consists of pure opinion. Such expert evidence, even if uncontradicted, is not conclusive, but merely advisory—only a guide. *Swope v. Seattle,* 36 Wash. 113, 78 Pac. 607; *Moore v. Ellis,* 89 Wis. 108, 61 N. W. 291; *Ewing v. Goode,* 78 Fed. 442.

In this connection, it may be noticed that, as against these three, there were two witnesses for the respondent. Two physicians of Seattle testified for respondent, and this is charged as error, on the theory that a physician residing elsewhere than San Francisco was not qualified to testify, since the services were rendered there. Whatever may be the general rule in this regard is not controlling here, for an understanding of the nature and kind of the disease, known of by all physicians in respect to the care and attention it exacts from the attending physician, could with ease be and was testified to by these two physicians, thus being of help to the court in weighing and appropriating the advisory testimony of all as to the value of the services —the ultimate concern of the court. If, in testifying, they, who must have some general idea of such values, do express themselves as to the amount, how shall it be well claimed as error, for at most it would in this respect be only immaterial, a quality which, in cases tried to the court, will find no reflection in the judgment reached. There was no mistake of law by the court in

the trial, while as to the amount allowed, we are quite convinced it is liberal.

Affirmed.

MAIN, C. J., FULLERTON, PARKER, and TOLMAN, JJ., concur.

[Nos. 14835, 14880. Department One. June 27, 1918.]

In the Matter of LOUISE CHARTRAND.[1]

INFANTS — DELINQUENCY — CUSTODY — JURISDICTION OF COURTS — HABEAS CORPUS. A superior court has power to commit a delinquent child to the custody of an institution without the county and still retain exclusive jurisdiction over the child; in view of Rem. Code, §§ 1987-1, 1987-2, and 1987-5, which makes a delinquent the ward of the superior court, and Id., §§ 1987-8 to 1987-10, conferring continuing jurisdiction upon a superior court to make any order for the custody and control of a delinquent minor necessary for its welfare; hence habeas corpus may issue from such court to inquire into the legality of such custody.

Consolidated appeals from orders of the superior courts for Chelan and King counties, Grimshaw and Jurey, JJ., entered March 7 and 14, 1918, denying petitions for a writ of habeas corpus. Reversed on Chelan county appeal; affirmed on King county appeal.

C. B. Conner, for appellant.

Burt J. Williams, for respondent.

TOLMAN, J.—The appellant, on the 7th day of March, 1918, presented her petition for a writ of habeas corpus to the superior court of Chelan county, alleging in effect: That she was unlawfully imprisoned and restrained of her liberty by the mother superior of the Home of the Good Shepherd, in the city of Seattle, King county, Washington; that the cause, or pretended cause, of such restraint was an order made and issued

[1]Reported in 173 Pac. 728.

by the said court "In the Matter of the Delinquency of Louise Chartrand," an action then pending in said court on the 27th day of June, 1917. And then follows allegations purporting to show that such order of restraint was and is void.

On the presentation of the petition, the superior court declined to consider or pass upon the petitioner's right to the writ, upon the ground and because it appeared in the petition "that the petitioner is confined within the county of King, state of Washington, and this court is without jurisdiction to grant the writ asked." Whereupon, and for the reason stated, the writ was denied, and the case comes here on appeal.

The appellant, after the refusal of the superior court of Chelan county to act upon her petition, filed a similar petition in the superior court for King county, with the same result, which cause likewise is brought here on appeal; and the appellant has made application for the consolidation of the two causes in this court.

It appears from the petition and the exhibits thereto attached that the petitioner was charged with being a juvenile delinquent within the meaning of Laws of 1913, ch. 160, p. 520 (Rem. Code, § 1987-1 *et seq.*). And the court in its original order of commitment provided:

"It is ordered, adjudged and decreed as follows: That said Louise Chartrand is a minor delinquent within the meaning of chapter 160 of the Laws of 1913 of the state of Washington; and it is further considered, ordered and adjudged, that the said Louise Chartrand be and she hereby is committed to The Home of the Good Shepherd, Seattle, Washington, until further order of the court or until said Louise Chartrand reaches the age of twenty-one years."

It is therefore apparent that the question here to be decided is, Did the superior court of Chelan county retain jurisdiction over the petitioner, and was the

application for the writ of habeas corpus made to the proper tribunal?

The juvenile court law, or juvenile act, Laws of 1913, ch. 160, p. 520 (Rem. Code, § 1987-1 *et seq.*), has been passed upon several times by this court, but not with reference to the question here raised. It will be necessary, therefore, to consider some features of the act briefly.

The last paragraph of § 1 of the act provides:

"For the purpose of this act only, all delinquent and dependent children within the state shall be considered wards of this state and their persons shall be subject to the custody, care, guardianship and control of the court as hereinafter provided." Rem. Code, § 1987-1.

In section 2 (p. 522):

"The superior courts in the several counties of this state shall have original jurisdiction in all cases coming within the terms of this act." Id., § 1987-2.

And in section 5 (p. 524):

"Any person may file with the clerk of the superior court a petition showing that there is within the county, or residing within the county, a dependent or delinquent child and praying that the superior court deal with such child as provided in this act." Id., § 1987-5.

From which it appears that the superior court, as to any such dependent or delinquent child, stands in the position of a guardian.

In the latter part of section 9 (p. 527):

"The jurisdiction of the court shall continue over every child brought before the court, or committed pursuant to this act, and the court shall have power to order a change in the care or custody of such child, if at any time it is made to appear to the court that it would be for the best interests of the child to make such change." Id., § 1987-9.

The court, therefore, having, by the terms of the act, such continuing jurisdiction, it would seem that such

jurisdiction continues wherever the child may be placed or committed by order of the court. And it appears to be the purpose of the act to allow the court great latitude in making such commitment in order to insure the greatest possible benefit to the child.

In section 8 (p. 525), it is provided:

"When any child under the age of eighteen years shall be found to be delinquent or dependent, within the meaning of this act, the court may, at any time, make an order committing the child to some suitable institution, or to the care of some reputable citizen of good moral character, or to the care of some training school or industrial school as provided by law, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for or obtaining homes for dependent, neglected, or delinquent children." Id., § 1987-8.

It requires no construction to determine from this language that it was the purpose to invest the superior court having the guardianship of any such child with the widest possible latitude and the greatest possible power, to the end that the child shall be suitably placed for the purpose of insuring its reformation and proper education and upbringing. And not only so, but may change the place of commitment whenever the circumstances require it, for the act provides in section 10 (p. 527):

"After acquiring jurisdiction over any child, the court shall have power to make an order with respect to the custody, care or control of such child, or any order, which in the judgment of the court would promote the child's health and welfare . . . and subject to being returned to the court for further proceedings whenever such action may appear to be necessary." Id., § 1987-10.

In fact, the whole act is replete with provisions showing that the jurisdiction of the court is continuing, and that the court at any time may make any necessary or-

der for the child's welfare. Nowhere in the act appears anything which requires the place of commitment to be within the county where the proceeding originated, and as the welfare of the child is the principal object sought, there seems to be no reason why the court should be so limited; and surely, if the court has power to commit the child to an institution without the county, it still retains its guardianship and jurisdiction over the child for all of the purposes of the act.

We have not overlooked Rem. Code, § 15, which says:

"Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties."

As in other cases where the court has undoubted jurisdiction of the person or the subject-matter its writs may run to other counties, so in this case; and moreover, as the court has continuing jurisdiction of the petitioner and has placed her beyond the boundaries of its county, under a law permitting the changing or modifying of the commitment at any time, it would be wholly illogical to hold that, by such extra-territorial commitment, it had lost jurisdiction for the purposes of the writ of habeas corpus.

It seems to us to require no argument, in view of the language used in the statute, to demonstrate that the superior court of Chelan county, having obtained jurisdiction over the petitioner under the act referred to, continued to have such jurisdiction over the petitioner, no matter in what county she might then by the order of such court be confined; and that the petition for the writ of habeas corpus was properly presented to said court as the court having jurisdiction of the petitioner.

For the reasons stated, the Chelan county cause will be reversed and remanded with directions to the trial court to receive and consider the petition and act upon the same upon the merits. And the King county case will be affirmed.

MAIN, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 14582. *En Banc.* June 28, 1918.]

THE CITY OF SEATTLE, *Respondent*, v. PUGET SOUND TRACTION, LIGHT & POWER COMPANY, *Appellant*.[1]

STREET RAILWAYS—FRANCHISES—POWER OF CITIES. Rem. Code, § 7507, providing that cities may authorize or prohibit and prescribe terms for the location of street railways upon the city streets, is a specific grant of power to impose franchise terms and conditions for such use of its streets.

SAME—DISCRIMINATION—CITY TAX. The fact that one city imposes no tax upon street railway use of its streets, does not prevent another city from doing so, on the theory that it would be unlawful discrimination.

SAME—REGULATION OF RATES—POWER OF PUBLIC SERVICE COMMISSION—FRANCHISES—ABROGATION. The public service commission law, Rem. Code, § 8626-53, conferring power upon the public service commission to deal with questions of safety, efficiency, rates and service of street railway companies, does not confer power to abrogate franchise provisions theretofore imposed by cities under the authority of Rem. Code, § 7507, subd. 7.

MUNICIPAL CORPORATIONS — TORTS — DAMAGES — ACTS IN GOVERNMENTAL CAPACITY—ENFORCING VOID ORDINANCE. A city in enforcing an invalid ordinance with respect to street railway fares, acts in its governmental capacity, and is therefore not liable to the company for losses thereby sustained pending litigation that resulted in declaring the ordinance void.

SET-OFF AND COUNTERCLAIM—DAMAGES — MATTERS NOT EMBRACED IN COMPLAINT. In an action by a city to recover two per cent of the earnings of a street railway company under its franchise, a claim for damages because of the city's enforcement of a void ordinance

[1]Reported in 174 Pac. 464.

with respect to fares, is not a proper subject of counterclaim; since it does not relate to the subject-matter of the action or arise out of contract.

STREET RAILWAYS — FRANCHISES — ACTION TO RECOVER TAX—DEFENSES. It is no defense to an action against a street railway company to recover two per cent of its earnings during the year 1916, that the company was damaged by the city's requiring the company to sell tickets under a void ordinance prior to 1915, where the company was not deprived of the right to operate under its franchises during the year 1916.

PLEADING—AMENDMENT—EFFECT. Under Rem. Code, § 304, requiring an amended pleading to be complete in itself, allegations in an original answer are waived by amended answers.

Appeal from a judgment of the superior court for King county, Ronald, J., entered September 13, 1917, in favor of the plaintiff, upon sustaining a demurrer to the answer, in an action to recover franchise rentals due a city from a street railway company. Affirmed.

James B. Howe, Hugh A. Tait, and *Edgar L. Crider,* for appellant.

Hugh M. Caldwell and *Walter F. Meier,* for respondent.

HOLCOMB, J.—Since 1900, appellant and its predecessors have paid to the city of Seattle two per cent of the gross receipts from operation of its street railway, as required by its franchises. In January, 1917, it refused to pay the sum of $64,387.78, the amount due for 1916, except upon conditions which were unacceptable to the city. Respondent brought action to recover the amount. A demurrer was sustained to appellant's affirmative defenses, and also to each of the three alleged defenses in its amended answer. Refusing to plead further, judgment was entered against appellant as prayed in the complaint.

Appellant assigns as errors the action of the court: (1) In sustaining respondent's demurrer to appellant's

first defense; (2) in sustaining respondent's demurrer to appellant's second and affirmative defense; (3) in sustaining respondent's demurrer to appellant's third and affirmative defense, and in holding that the action of respondent set forth in such defense did not impair the obligation of the contract between respondent and appellant, in contravention of § 10, art. 1, of the constitution of the United States, and did not deprive appellant of its property without due process of law and deny it the equal protection of the law, in contravention of the fourteenth amendment to the constitution of the United States, and also in contravention of §§ 3 and 23, art. 1, of the constitution of the state of Washington; (4) in rendering judgment in favor of respondent against appellant for the sum sought to be recovered by respondent, and thereby upholding the action of respondent whereby the obligation of the contract between appellant and respondent was impaired, in contravention of § 10, art. 1, of the constitution of the United States, whereby appellant was deprived of its property without due process of law, in contravention of the fourteenth amendment to the constitution of the United States, and also of §§ 3 and 23, art. 1, of the constitution of the state of Washington; (5) in not holding that the third and affirmative defense constituted a complete estoppel against respondent, estopping it from recovering in this suit until it should refund to appellant the loss sustained by appellant by the enactment and enforcement of ordinance No. 28,253.

The main question for us to decide is whether the demurrer to appellant's amended answer has been properly sustained. We will attempt to follow appellant's assignments in order.

Appellant concedes that, until the enactment of the public service commission law in 1911 (Laws 1911, p. 538; Rem. Code, § 8626-1 *et seq.*), the condition in the

franchises requiring the payment of a percentage upon the gross earnings of the street railways was one with which it could legally comply. Appellant admitted the actual terms of the franchises, but denied the legal conclusions pleaded in the complaint. There is no dispute as to the amount involved, nor is there any question involved which makes it necessary to distinguish between the appellant and its predecessors in interest. Although the first defense, standing alone, raised an issue by denials, nevertheless appellant either conceded or admitted the facts triable under that issue, attempting to avoid the obligation pleaded in the complaint by its affirmative defenses.

In its second and affirmative defense, appellant pleads, in substance, the passage by the 1911 legislature of "an act relating to public service properties, providing for the regulation of the same, fixing penalties for the violation thereof, making an appropriation, and repealing certain acts," which has ever since been, and is now, in force and effect; that defendant is a corporation authorized to construct, maintain and operate street railways in the cities of Seattle and Bellingham, and that it has been for four years last past a common carrier of passengers upon the street railways authorized to be constructed and operated under the ordinances mentioned in the complaint; that the franchises of Seattle require that a percentage of the gross receipts of appellant be paid it, while the franchises granted to appellant by the city of Bellingham do not require such percentage; that the provision of the franchises mentioned in the complaint in this action, requiring the payment to Seattle of a percentage upon the gross receipts derived from the operation of the street railways under such franchises, is an undue and unjust discrimination against persons and localities in and outside of Seattle, and since the enactment of the

public service commission law, approved March 18, 1911 (Laws 1911, p. 538; Rem. Code, § 8626-1 *et seq.*), was, and now is, against the public policy of the state of Washington.

Appellant claims that the legislative authority of a city, acting as an agency of the state, has no power to prescribe for its own benefit terms and conditions not subject to future state control. In 1890, the legislature passed the enabling act relating to cities. Subdivision 9, § 5, of this act (Laws 1890, p. 218), Rem. Code, § 7507, contains the following grant of power:

"To authorize or prohibit the locating and constructing of any railroad or street railroad in any street, alley, or public place in such city, and to prescribe the terms and conditions upon which any such railroad or street railroad shall be located or constructed; . . ."

This is a plain and specific grant by the state to the city of power to impose terms and conditions upon which any of its streets may be used by a street railroad. Specific and broader language could hardly be used.

In *Tacoma R. & Power Co. v. Tacoma,* 79 Wash. 508, 140 Pac. 565, it was held the legislature intended to, and did, vest the city with the whole of the state's police power touching the subject-matter. *State ex rel. Spokane & B. C. Tel. Co. v. Spokane,* 24 Wash. 53, 63 Pac. 1116; *Western Union Tel. Co. v. Richmond,* 224 U. S. 160; *Coverdale v. Edwards,* 155 Ind. 374, 58 N. E. 495; *State ex rel. Tacoma v. Sunset Telephone & Telegraph Co.,* 86 Wash. 309, 150 Pac. 427, L. R. A. 1917F 1178; *State ex rel. Tacoma R. & Power Co. v. Public Service Commission,* 101 Wash. 601, 172 Pac. 890.

The question here is whether the public service commission law, either by its terms or by necessary implication, attempted to confer power upon the public

service commission to modify or abrogate franchise provisions which had theretofore been imposed by the city in granting the franchises under the specific grant of the legislature. Rem. Code, § 7507, subd. 7. Appellant points us to § 21, p. 555, Laws 1911, Rem. Code, § 8626-21, which is as follows:

"*Unreasonable Preference.* — No common carrier shall make or give any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Appellant claims that, if a resident and taxpayer of Bellingham is transported upon the street railway lines in Seattle, he receives no benefit because a percentage upon his fare is paid into the city treasury of Seattle, while the resident taxpayers of Seattle who travel upon the lines in Seattle receive a benefit because a percentage upon the fares paid by them is paid into the treasury of Seattle; that to exact compensation for the use of public property of the state in one locality, while the use in another locality is free from such exaction, constitutes an undue discrimination in favor of one locality and against the other.

Can it be said that a municipality cannot exact a different rate of tax because some one city has failed to exact a tax upon the property within its boundary? Manifestly not. Furthermore, Laws 1911, p. 555, § 21, Rem. Code, § 8626-21, has no application to a franchise tax or the payment of a percentage of the gross earnings by a common carrier, and has no application to the case at bar. If the law confers power upon the public service commission to modify or abrogate franchise provisions, it must be found in Laws 1911, p. 571,

§ 53 (Rem. Code, § 8626-53), which confers upon the commission the power to deal with the questions of safety, efficiency, rates and quality of service. There is nothing in this section which, either expressly or by necessary implication, confers power upon the public service commission to deal with the question of franchises or to modify or abrogate any of the terms or conditions that may have previously been imposed therein. The law will be searched in vain for any provision which confers such power upon the public service commission with reference to such a public utility as that before us.

"The right to deal with the question of rates and service is an entirely different matter from the right to grant franchises or abrogate the provisions thereof. The franchises in question having been granted under the clear and express authority of the statute enacted long prior to the public service commission law, it seems plain that it was not the intent of the latter law to grant power to the commission to abrogate franchise provisions. Had the legislature desired to confer this power upon the commission it would have been easy to have said so in such language as would have made the intent plain." *State ex rel. Tacoma R. & Power Co. v. Public Service Commission,* 101 Wash. 601, 172 Pac. 890.

The substance of appellant's third and affirmative defense is as follows: That the franchises enumerated in the complaint, before being granted, were offered to the highest bidder; that they contained a provision that there should be kept on sale at the main office and power stations of the grantee twenty-five commutation tickets for one dollar; that the franchises also provided that the grantee might establish and take a passenger fare not to exceed five cents for a single continuous ride within the city; that, in October, 1911, council bill No. 16,096 was passed, requiring all street

car companies to sell on its cars twenty-five car tickets for one dollar, or six for twenty-five cents, and providing that any person or corporation failing to comply with this requirement should be deemed guilty of a misdemeanor and fined not to exceed one hundred dollars, or imprisoned in the city jail not to exceed thirty days; that, while this bill was pending, appellant appeared before the city council and protested against the passage of such bill, on the ground that it would violate the terms of its franchise and would be a law impairing the obligation of the contract with respondent; that, although protested against, the bill was passed, vetoed by the mayor, and was passed over the mayor's veto and became ordinance No. 28,253; that such ordinance took effect on November 19, 1911; that, before it took effect, appellant instituted suit in the circuit court of the United States for the western district of Washington against the respondent herein to enjoin the enforcement of such ordinance, alleging that its enforcement would damage the holder of the franchises in a sum in excess of $5,000, and that the ordinance was null and void for the reason that it impaired the obligation of appellant's contract and was forbidden by § 10, art. 1, of the constitution of the United States; that the city successfully resisted the issuance of a temporary injunction, "and during the pendency of such suit the Seattle Electric Company was compelled to comply with the provisions of the ordinance," and the appellant, as its successor, was likewise compelled by the respondent herein to comply with the ordinance until August 15, 1913, at which time a decision was rendered, holding the ordinance invalid upon the ground that it was beyond the power of the city to enact such ordinance; that, by reason of the enforcement of the ordinance, appellant was caused a loss, during the pendency of such suit, of upwards of

$70,000; that the respondent has refused to refund any portion of the compensation so lost by it and them, and that such refusal and the enforcement by respondent of its claim for two per cent of the gross receipts derived from operating the street railway impairs the obligation of the contract of the appellant with the city of Seattle, created by the franchises mentioned in the complaint, in contravention of § 10, art. 1, of the constitution of the United States, and deprives the appellant of its property without due process of law; and denies it the equal protection of the law, in contravention of the fourteenth amendment to the constitution of the United States, and also of §§ 3 and 23, art. 1, of the constitution of the state of Washington.

The main questions involved in this defense have been tried in *Seattle Electric Co. v. Seattle,* 206 Fed. 955. It was there held that ordinance No. 28,253 was null and void. It is also said:

"The plaintiff further contends that it has been damaged in the sum of $5,000 per month since the commencement of this suit by reason of the fact that it has been compelled to sell commutation tickets at reduced rates fixed by the ordinance, and it claims damages on that basis. Waiving the question whether these damages have been proved by competent evidence, I am clearly of opinion that they are not recoverable, either at law or in equity. Municipal corporations are created by the state for political objects, and are invested with certain governmental powers, to be exercised for local purposes and for the public good. . . . The distinction between governmental powers and mere private franchises has often been recognized by the courts of this state, and the nonliability of municipalities for acts committed in the exercise of the former had been asserted in the most positive terms. *Lawson v. Seattle,* 6 Wash. 184, 33 Pac. 347; *Simpson v. Whatcom,* 33 Wash. 392, 74 Pac. 577, 63 L. R. A. 815, 99 Am. St. 951; *Lynch v. North Yakima,* 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261;

Cunningham v. Seattle, 40 Wash. 59, 82 Pac. 143, 4 L. R. A. (N. S.) 629; s. c., 42 Wash. 134, 84 Pac. 641, 4 L. R. A. (N. S.) 629, 7 Ann. Cas. 805. If a municipality ever acts in a purely governmental capacity, it would seem to so act in the passage of an ordinance of this kind in relation to a subject in which the general public is alone concerned, and in which it has no private or proprietary interest."

The case of *Simpson v. Whatcom, supra,* cited therein, is especially apt. See, also, Cooley, Torts (2d ed.), p. 739; Dillon, Municipal Corporations, § 976; 5 Thompson, Negligence, § 5789.

If, in attempting to carry out one of its authorized functions, a municipality exceeds its statutory authority, the corporation is not liable for injuries that result. 19 R. C. L. § 414, and cases cited. These authorities amply support the decision in 206 Fed. 955.

Another question is: Even should we hold that appellant has a cause of action if brought independently, could it be properly set off as a counterclaim in this action under Rem. Code, § 265; does it relate to the same matter embraced in the complaint or arise out of contract? Appellant's damage is claimed on account of the passage of a void ordinance in 1911 and appellant's obedience thereto until August 15, 1913. This is not a proper counterclaim to the complaint demanding two per cent of its gross receipts for 1916 as provided in the franchises. In *Veysey v. Thompson,* 49 Wash. 571, 95 Pac. 1096, it was held that a counterclaim for damages arising out of the wrongful issuance of an attachment cannot be pleaded in answer to the complaint in the original action. See, also, *Hyde v. Clausin,* 82 Wash. 218, 144 Pac. 50.

We do not think that appellant's third and affirmative defense would have the effect of barring respondent's recovery as set forth in the complaint, nor will it support an affirmative judgment as pleaded.

Appellant relies on *Crawford v. Seattle, Renton & S. R. Co.*, 97 Wash. 70, 165 Pac. 1070, for its nonliability to pay the two per cent of its gross receipts, but that case is readily distinguishable from the case at bar. In that case the city was attempting to collect the two per cent of the gross receipts *during the period* that the railway company was denied the right to operate under its franchise, which the city council had attempted theretofore to revoke. In the present case, by a void ordinance, until August 15, 1913, the city attempted to require the company to sell car tickets at the same rate but at places other than those specified in the franchise. There is no claim by appellant that it was deprived of the right to operate fully and unmolested under its franchise during 1916, for which year the city claims the two per cent of the gross receipts. There is no allegation in appellant's defenses that it filed a claim with the city as required by Seattle charter, art. 4, § 29, and Rem. Code, § 7995.

Appellant contends that, by virtue of the passage of the void ordinance No. 28,253 and the alleged damage subsequently sustained by it, the city is now estopped from recovering in this suit until the original status existing between the parties has been restored. There is no such allegation in the amended answer, and we cannot now consider it. All allegations in the original answer are waived by filing and serving the amended answer. The last amended answer must be considered complete for purposes therein alleged. In *Sengfelder v. Hill*, 16 Wash. 355, 47 Pac. 757, 58 Am. St. 36, it is said: "When he elects to amend and does amend, he must stand upon the case as stated in his amendment." The statute is clear on this matter. Rem. Code, § 304, reads:

"When any pleading or proceeding is amended before trial, mere clerical errors excepted, it shall be done

by filing a new pleading, to be called the amended complaint, or otherwise, as the case may be. Such amended pleading shall be complete in itself, without reference to the original, or any preceding amended one."

There being no error in the trial court's ruling, the judgment is affirmed.

MAIN, C. J., MITCHELL, FULLERTON, PARKER, and TOLMAN, JJ., concur.

[No. 14646. Department Two. July 3, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. S. A. HEWETT, *Appellant*.[1]

INDICTMENT AND INFORMATION—VERIFICATION—DEPUTIES. An information may be verified by the deputy prosecuting attorney before the deputy county clerk.

CRIMINAL LAW—TRIAL—LIMITING ARGUMENT—DISCRETION. It is discretionary in a criminal action to limit the time for argument to the jury to three hours, and only abuse of discretion warrants interference therewith.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 25, 1917, upon a trial and conviction of murder in the first degree. Affirmed.

Joseph M. Glasgow, for appellant.

Alfred H. Lundin, Frank P. Helsell, and *Joseph A. Barto*, for respondent.

MACKINTOSH, J.—The verification of the information in this case was made by the deputy prosecuting attorney before a deputy clerk of the superior court, who signed the jurat in the name of his chief, by himself as deputy. This court has held in *State v. Rosener*, 8 Wash. 42, 35 Pac. 357; *State v. Clark*, 58 Wash. 128, 107 Pac. 1047; *State v. White*, 12 Wash. 417, 41 Pac.

[1]Reported in 173 Pac. 726.

182, that the verification of the information is sufficient when the jurat is so signed by a deputy clerk.

Error is also predicated upon the limiting of counsel for the defendant in his argument to the jury to a period of three hours. The matter of the allotment of time for argument is one resting within the discretion of the trial court. As he is familiar with the issues to be argued and all the minutiae of the case, upon which he can determine the time that should be consumed in properly presenting the issues to the jury, that discretion will not be interfered with unless it appears that the exercise of it has been abused. In this case there is no showing that would justify us in holding that there was any abuse of discretion in this regard.

The judgment of the superior court must be affirmed.

MAIN, C. J., MOUNT, and HOLCOMB, JJ., concur.

[No. 14808. Department Two. July 3, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. HENRY SEABLOM, *Appellant*.[1]

CRIMINAL LAW—EVIDENCE—CONFESSIONS—DURESS. An accused's voluntary confession, deliberately signed, is not tainted with duress or coercion from the fact that when arrested he was taken before the mayor, who was a justice of the peace and attorney, and the deputy sheriff, the prosecuting attorney and others.

INTOXICATING LIQUORS — OFFENSES—UNLAWFUL POSSESSION — EVIDENCE—SUFFICIENCY. A conviction of the unlawful possession of whiskey is sustained, though accused testified it was found to be only colored water, where he obtained it from a drug store at the agreed price for whiskey, approximately the same amount of whiskey disappeared from the store, and the accused signed a confession that he got the whiskey.

CRIMINAL LAW—TRIAL—REMARKS BY COURT. In a prosecution for the illegal possession of whiskey, it is not prejudicial error for the judge to say that the court never ordered a witness not to tell the

[1]Reported in 173 Pac. 721.

truth, when the prosecutor asked whether another implicated with the accused "came up on the stand, under the order of the court, and refused to tell the truth."

SAME. Upon sustaining objection to improper evidence it is not error for the court to indicate or mark the boundary between testimony that is competent and that which is not.

SAME—APPEAL—HARMLESS ERROR. In a prosecution for illegal possession of whiskey, it is harmless to instruct to convict if the liquors were by the accused purchased, "stole" or secured in any way, where it was admitted that what he had was stolen.

SAME—TRIAL—INSTRUCTIONS. In a prosecution for illegal possession of whiskey, an instruction to consider statements of a witness not made on the witness stand only for the purpose of affecting his credibility is not error as calling attention to such witness, who had been tried and convicted for the same offense.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered October 3, 1917, upon a trial and conviction of violating the prohibition law. Affirmed.

J. Y. Kennedy, for appellant.

Lloyd L. Black and *Jesse H. Davis,* for respondent.

CHADWICK, J.—Accepting a statement made by appellant to the officers after his arrest, and to which we shall hereafter refer, and other testimony the competency of which is not challenged, it is made to appear that one J. L. Randles was, at and prior to the 11th day of April, 1917, engaged in the drug business at Granite Falls, in Snohomish county. He had in his employ one Harry Wallin. Appellant had met up with Wallin in Seattle some days before, and it was arranged that Wallin would sell to defendant thirty-five gallons of whiskey at $5.50 per gallon. The time fixed for the delivery was on the night of April 11, Wallin agreeing that he would have the whiskey packed in containers for shipment by automobile, and that he would so arrange the store and its interior as to make

it appear that a burglary had been committed, to deceive the proprietor, Mr. Randles, who was out of town at the time, and the officers. Appellant employed one Johnson, a driver of an "auto for hire," to take him to Granite Falls. They found Wallin. The containers with their contents were loaded in the machine and carried to Woodland Park, Seattle, and there concealed. Appellant was thereafter arrested, tried and convicted of the crime of having in his possession intoxicating liquor with intent to barter, sell, exchange, etc., in the course of trade.

Before taking up other assignments of error, it will be proper to refer to the confession of appellant. It is contended that it was obtained under the coercion of "numbers, superior talent and ability, and legal knowledge." Appellant, when arrested, was brought into the presence of the mayor of Granite Falls, who was, at the same time, a justice of the peace and an attorney at law, the chief deputy sheriff, also a lawyer, the prosecuting attorney and others, who took his confession and reduced it to writing. It was then signed by appellant. We find nothing in this circumstance to taint the transaction with duress or coercion. The confession, so far as the testimony of the state is concerned, was made voluntarily, and deliberately signed. While we hardly think the question is in issue, if it were, the court instructed the jury to reject the confession as evidence if it found that it "was made under the influence of fear induced by threats." It being at best a disputed question of fact, the verdict of the jury concluded appellant to pursue the question further.

Appellant complains that the state has failed in its proofs, in that it is not shown that the goods transported were, in fact, whiskey. This contention rests entirely upon the testimony of appellant and his co-

defendant. He says that, after reaching Woodland Park, he investigated the contents of the containers and found them to contain colored water. It was, indeed, incumbent upon the state to prove the charge as made, but we think there is enough competent evidence to sustain the verdict. Mr. Randles testified that he had on hand, on April 11, approximately thirty-six gallons of whiskey in a barrel. That, when he examined the barrel on the 12th, only about two gallons remained. It is not denied that appellant got whatever he hauled away at the drug store, that he paid the agreed price for whiskey, and, in his confession, he says that he got whiskey. It is true that he now says that what he said was that he "supposed" or "thought" he was getting whiskey; but manifestly these were questions for the jury, and it no doubt weighed appellant's testimony against all of the other facts and circumstances and found it wanting.

J. E. Johnson, who was accused of the same crime, was a witness for appellant. When upon the stand he was asked concerning the testimony of Wallin, who was also a witness, as follows:

"Q. Counsel has asked you if you had any understanding with Wallin. In your trial do you remember Wallin came up on the stand, under the order of the court, and refused to tell the truth in your case?" A. He has— Q. Do you remember he wouldn't answer questions, just like he has done now? Wallin, I am talking about."

The court then interrupted with the following remark: "I do not think that is a fair statement. The court never ordered him not to tell the truth." It is complained that this remark of the trial judge was unfavorable and critical and was calculated to deprive the appellant of a fair trial. As written and properly punctuated, it is evident that the question did not im-

ply that the court had ordered the witness Wallin not to tell the truth, but we can readily understand that the court might misinterpret the spoken words. However, we see no cause for complaint. To torture the transaction into prejudicial error would be to resort to the extreme of technicality.

It is also insisted that, after some objections had been made and sustained to the introduction of improper testimony, the trial judge said, "You may ask him if he made any objection to the particular parts mentioned." We find no error in this. We are not inclined to treat the court as an umpire to decide cases, or to conduct trials, upon the wit and skill of counsel. Within proper bounds, it is the duty of the court, and it is consistent with the impartial administration of justice, to direct the course of the trial and to mark the boundary between testimony which is competent and that which is incompetent.

It is also complained that the court instructed the jury that, if it believed from the evidence and beyond a reasonable doubt "that the appellant, Henry Seablom, . . . purchased, *stole* or secured in any way and had in his possession more than two quarts of whiskey, then I instruct you that you must find the appellant guilty as charged." Ordinarily the use of the word "stole" or "stolen" would be prejudicial, for, as counsel rightly contends, it involves the reference to another serious crime; but under the facts disclosed, appellant cannot complain, for whatever he had in possession was confessedly stolen, and the court was warranted in treating the manner in which the liquid was obtained as an admitted fact.

The court instructed the jury:

"You are further instructed that certain evidence has been admitted as to statements made by the witness Johnson while in confinement at the county jail.

"You are instructed that the only purpose for which you can consider any evidence as to statements made by the witness Johnson not given by him on the witness stand before you is in so far, if at all, as in your opinion such statements tend to affect his credibility as a witness, that is, as bearing on the weight which you will give to his testimony in making up your verdict in this case."

It is complained that the instruction calls particular attention to the witness Johnson, who had been tried and convicted of the same offense, and that the instruction is unfair. We find no error in this instruction. The witness Johnson had made a like confession of guilt, but in his testimony he had said that, when he and appellant had arrived at Woodland Park, they tasted the contents of the containers and found it to be only colored water.

It would seem that the instruction was called for and was, if anything, favorable to the appellant. The jury was properly advised that it should not consider any extra judicial statement made by Johnson as proof of the ultimate fact, but only in so far as it might affect his credibility as a witness.

We find no error, and judgment is affirmed.

MAIN, C. J., MOUNT, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14700. Department Two. July 3, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. J. E. JOHNSON, *Appellant*.[1]

CRIMINAL LAW—EVIDENCE—CONFESSIONS. Whether a confession of illegal possession of whiskey was obtained by duress is irrelevant where the accused testified on the stand to everything in the confession save only that he testified that he "thought" it was whiskey.

CRIMINAL LAW—APPEAL—MISCONDUCT OF COUNSEL—RECORD. Error cannot be assigned upon improper argument of the prosecuting attorney, in the absence of a request for an instruction to the jury to disregard it.

SAME—APPEAL—RECORD — AFFIDAVITS. Affidavits upon a motion for a new trial must be certified as part of the statement of facts, or they cannot be considered.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered June 9, 1917, upon a trial and conviction of violating the prohibition law. Affirmed.

J. Y. Kennedy, for appellant.

Lloyd L. Black and *Jesse H. Davis*, for respondent.

CHADWICK, J.—This case is a companion case and involves the same crime as described in *State v. Seablom, ante* p. 53, 173 Pac. 721. It is complained that the confession of Johnson should not have been received. The only difference between the case of Seablom and appellant is that appellant says that the deputy prosecuting attorney said: "We have got you under a charge of burglary. You had better tell something. You are trying to protect Wallin . . . You are getting in bad yourself."

Appellant requested the following instruction:

"You are instructed that no officer or person having the custody and control of the body or liberty of any

[1]Reported in 173 Pac. 723.

person under arrest, shall refuse permission to such arrested person to communicate with his friends or with an attorney, nor subject any person under arrest to any form of personal violence, intimidation, indignity or threats for the purpose of extorting from such person incriminating statements or confession."

The error complained of rests upon the testimony of the appellant that the officers refused to permit him to use the telephone or to procure an attorney, and the so-called threat of the deputy prosecuting attorney. Inasmuch as appellant was a witness and testified even in greater detail to everything written in the confession, and the controversy over the admission of the confession goes only to the question whether the appellant said that he had transported "whiskey" in his automobile or, as he now contends, that he "thought it was whiskey," we think the question raised is really irrelevant to the issue, for, under appellant's own theory, if the words had been written down "I thought it was whiskey," he would not now be complaining. Whether it was whiskey or not is a question of fact and, as we have held in the *Seablom* case, appellant is concluded by the verdict.

In his closing argument to the jury, the prosecuting attorney said:

"These officers wanted to get just what these men had said, but they wanted it right, because, if Wallin was guilty they could convict Wallin; if they were guilty, so they couldn't change their testimony and say they were only guilty of a minor charge. As a matter of fact, my friends, I am not sure but what these men are exceedingly fortunate in not being tried for grand larceny, a penitentiary offense."

Upon objection, the court said: "I think you had better not press that for the present." It is complained that this was misconduct and prejudicial to the

extent of depriving appellant of a fair trial. The granting of a new trial for misconduct of counsel, unless entirely flagrant, is within the discretion of the trial court (*Johansen v. Pioneer Mining Co.*, 77 Wash. 421, 137 Pac. 1019), and from the record we must now assume that counsel was content to arrest the prosecuting attorney in his argument. He did not move the court to instruct the jury to disregard the statement of the prosecutor. We have held frequently that a mere objection to improper argument on the part of an attorney is not enough; for, being bound to credit the jury with common understanding, we must, in the interest of finality in judicial proceedings, presume that the jury would understand that the argument to which an objection has been sustained was not to be considered in making up a verdict. If the misconduct is such as to warrant the belief that an improper impression may be carried away by the jury, it is incumbent upon the appellant to ask the court to specially direct the attention of the jury to the improper argument and to advise it that such argument is not to be considered. *State v. Regan,* 8 Wash. 506, 36 Pac. 472; *State v. Bailey,* 31 Wash. 89, 71 Pac. 715; *State v. Meyerkamp,* 82 Wash. 607, 144 Pac. 942; *Cranford v. O'Shea,* 75 Wash. 33, 134 Pac. 486; *State v. Johnston,* 83 Wash. 1, 144 Pac. 944.

It is finally insisted that the judgment should be reversed and the verdict set aside because one of the jurors was knowingly prejudiced against appellant and concealed his belief as to his guilt or innocence at the time he was examined on *voir dire.* The showing made by appellant is by affidavits which were before the trial judge when he passed upon the motion for a new trial. They are brought here in the transcript and are not made a part of the statement of facts. We have so often held that affidavits that are not certified as a

part of the statement of facts will not be considered upon appeal that it is unnecessary to cite the authorities. There is no error, and the judgment is affirmed.

MAIN, C. J., MOUNT, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14721. Department Two. July 3, 1918.]

LYDIA PEERY, *Respondent*, v. LONDON ASSURANCE CORPORATION, *Appellant*.[1]

APPEAL — RECORD — EXCEPTIONS. Error cannot be assigned upon the refusal of a new trial because of an error to which no exception was taken at the trial.

WITNESSES—IMPEACHMENT. Upon an offer to impeach the plaintiff's testimony as to a letter which she claimed was written by an insurance agent in her presence on May 20, a letter written on May 22d not in her presence is inadmissible.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 15, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a fire insurance policy. Affirmed.

H. T. Granger, for appellant.

O. O. McLane, for respondent.

MACKINTOSH, J.—The appellant claims that a new trial should have been granted because of two errors of the trial court. The first assignment cannot be considered here, as no exception was taken by the appellant to the adverse ruling. The second relates to the refusal of the admission of an offered letter written by an insurance agent to his company regarding a policy issued to respondent. The purpose of the offer was to

[1]Reported in 173 Pac. 721.

impeach the respondent's testimony as to a letter which she claims the agent wrote in her presence on May 20. The letter offered was written on May 22, and the agent testified that it was not written in the respondent's presence, and he denies that any letter was written at the time or place or under the circumstances testified to by the respondent. The ruling of the trial court was correct, for the reason that the exhibit offered confessedly was not the one concerning which the respondent testified, and was not proper impeachment.

The judgment of the lower court will be affirmed.

MAIN, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14724. Department Two. July 3, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. PHIL L. AUSTIN, *Appellant*.[1]

INDICTMENT AND INFORMATION—SUFFICIENCY—PRACTICING DENTISTRY WITHOUT LICENSE. An information for practicing dentistry without a license, in the language of the statute, is sufficient without alleging the nature of the disease or lesion or the treatment.

PHYSICIANS AND SURGEONS—PRACTICING WITHOUT LICENSE—SUFFICIENCY. A conviction of practicing dentistry without a license is sustained where the accused had no license and admitted putting medicine on a patient's gums because they were sore.

WITNESSES—CROSS-EXAMINATION—CREDIBILITY. Where defendant, accused of practicing dentistry without a license, testified on cross-examination that he had never done any dental work himself, it is proper as testing his credibility to ask if he had not done dental work for certain named persons.

Appeal from a judgment of the superior court for King county, Smith, J., entered October 15, 1917, upon a trial and conviction of practicing dentistry without a license. Affirmed.

[1]Reported in 173 Pac. 725.

Howard O. Durk, for appellant.

Alfred H. Lundin, Frank P. Helsell, and *Joseph A. Barto,* for respondent.

MACKINTOSH, J.—The jury found the defendant guilty of practicing dentistry without a license, upon an information which the defendant claims did not state facts sufficient to constitute a crime, and against which the defendant moved for an order requiring it to be made more definite and certain. It is sufficient to say, in passing on these two assignments of error, that the information was substantially the same as that in the case of *State v. Littooy,* 52 Wash. 87, 100 Pac. 170, which was held by this court to be a good information.

The other assignments of error are that there was not sufficient evidence to sustain the verdict, and that error was committed in permitting the prosecuting attorney to cross-examine the defendant with reference to dental work done by him for four or five persons other than the prosecuting witness. An examination of the record shows that the defendant testified on cross-examination as follows:

"Q. Did you rub any brown liquid of any sort on his gums? A. Yes, I think I did. Q. What for? A. Why, on account of being sore. Q. Oh, you were treating his gums? A. They were sore and I just put the brown medicine on."

This was sufficient to sustain the verdict, taken in conjunction with other testimony in the case.

The defendant, while on the stand, testified that he had no license to practice dentistry, and that the actual dental work in his office was performed by licensed dentists in his employ. On cross-examination, the prosecuting attorney asked the defendant if he had ever done any dental work himself. He answered that

he had not. He was then questioned as to whether he had not, as a matter of fact, done dental work for certain named persons. This was proper cross-examination for the purpose of testing the credibility of the witness, and we find no error therein.

The judgment of the lower court will be affirmed.

MAIN, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14730. Department Two. July 3, 1918.]

ROBERT E. DONALDSON *et al.*, *Respondents*, v. JAMES E. BREWSTER *et al.*, *Appellants*.[1]

CONTRACTS—BUILDING CONTRACTS—CONSTRUCTION—"ROUGHING-IN" PLUMBING—EXTRAS—PROOF OF CUSTOM. Where the contractor furnished a list of the materials required for "roughing-in" the plumbing "the same being represented to include all the material necessary to be used in the plumbing" in accordance with the plans and specifications, further guaranteeing that no extras will be required to complete the building, it was not competent for the contractor to show a custom in the plumbing trade to make contracts with reference to "roughing-in" and the supplying of fixtures, so as to leave a hiatus between the "roughing-in" process and the setting of the fixtures, and make the owner liable for extra material for "finishing"; no such custom having been brought to the notice of the owner.

SET-OFF AND COUNTERCLAIM—BUILDING CONTRACTS—PAYMENT FOR MATERIAL AGREED TO BE FURNISHED. Under a contract to do the plumbing and furnish all the materials required, at not to exceed a certain sum, an owner who paid for the materials which the contractor listed as necessary may counterclaim therefor against the balance due upon the contract.

Appeal from a judgment of the superior court for King county, Marion Edwards, judge *pro tempore*, entered October 19, 1917, upon findings in favor of the plaintiff, in an action to foreclose a mechanics' lien. Modified.

[1]Reported in 173 Pac. 1018.

Roberts, Wilson & Skeel, for appellants.

Vince H. Faben, for respondents.

CHADWICK, J.—Plaintiff, R. E. Donaldson, entered into a contract on the 5th day of April, 1916, with appellant James E. Brewster for the plumbing of a certain apartment house which the appellants were then erecting in the city of Seattle. We shall refer to the parties as plaintiff and defendant.

The contract provided, among other things, that the plaintiff "would perform all work in a first-class, workmanlike manner, and in accordance with the plans and specifications and to the satisfaction of the superintendent of the building, for the sum of $1,060.

"That Donaldson was to push the same rapidly to completion and to use all due and reasonable diligence in the performance of said work, and to so carry on the work as not to interfere with others working upon the building, and complete said work within such time as is consistent with a good and workmanlike job, time being made of the essence.

"That the party of the second part has furnished to party of the first part a list of the materials which will be required for *roughing-in* the plumbing, the same being represented to include all the material necessary to be used in the plumbing of said apartment building, in accordance with the plans and specifications and requirements, and the party of the second part hereby agrees and guarantees that the list so furnished by him will in every way be sufficient to complete the building in accordance with the plans and specifications, and that no extra materials will be required, and does further guarantee and agree that if any extra material shall become or be found necessary during the progress of the work, that the cost of any such extra materials over and above the said list shall be deducted from the contract price.

"Also guaranteeing that the above mentioned list is a complete and sufficient list of all the material necessary to complete the plumbing in the building."

At the same time and as part of the contract, plaintiff entered into a bond in which it is recited:

"That said R. E. Donaldson has furnished to J. M. Brewster a certain list of material necessary to be used in installing said plumbing and guarantees said list to be a complete and sufficient list of material to be used in the building, and for the performance of the contract in other particulars."

At the time the contract was entered into, plaintiff furnished defendant with a list of materials and a list of the fixtures that were necessary to be installed to meet the plans and specifications. The materials were listed as of the value of $1,787.50.

Plaintiff filed a lien, asserting that he had done work and labor of the reasonable value of $1,159.84. He admitted that he had been paid $835, and asked judgment for $324.84 and for the foreclosure of his lien. Defendant answered, setting up the contract to do the work according to the plans and specifications at an agreed price of $1,060, that there had been an unreasonable delay in the performance of the work, to his damage in the sum of $800, and that the work done was defective, to his damage in the sum of $500. The court below held that plaintiff was entitled to no more than the amount of his contract; that is to say, $1,060, and denied a recovery for the difference between that sum and the sum of $1,159.84, which was claimed on *quantum meruit*. The court held, however, that, for the purposes of an appeal, if one were taken, the value of "roughing-in" material used by the plaintiff, over and above the list which had been furnished as a part of the contract, was $95, which is approximately the difference between the contract price and the amount claimed in the lien. Defendant paid to the plumbing supply house $235 for materials over and above material listed by the parties. A recovery was denied

defendant upon the theory that the contract of the parties did not cover anything more than what is called in the plumbing trade "roughing-in" of a job, and that between the "roughing-in" and the setting of the fixtures certain materials are required. These are referred to as "finish," and this item not being covered by the contract, defendant could have no recovery. This theory of the case is maintained by the plaintiff, and it is now asserted that the contract was for the "roughing-in" of the plumbing and the setting of the fixtures, and that certain materials were required that were not enumerated in the list of materials that was furnished at the time the contract was entered into. Plaintiff has undertaken to prove, and it may be granted, as the court found, that there is a custom among plumbers to make their contracts with reference to "roughing-in" and the supplying of fixtures, so as to leave a hiatus between the "roughing-in" process and the setting of the fixtures, which will give ground for a legitimate charge for extra material for "finishing." It was upon a finding of such a custom that the court based his judgment in this particular, but whatever the custom may be, the parties in this case are bound by their contract, and if the contract does not sustain the charge, respondent cannot recover.

It seems to us that the trial judge has isolated and given emphasis to the words "a list of the materials which will be required for 'roughing-in' the plumbing." If these words stood alone the judgment might be supported by proof of the custom and the trade meaning of the words "roughing-in," but the parties in their contract have given definition to the term—a definition that is not only clear but, whatever the custom among plumbers may be, seems entirely consistent with the conduct of a prudent man about to contract for the building of a house. The parties have

said "A list of materials . . . for 'roughing-in'." They then define the meaning of the term, "the same being represented to include all the material necessary to be used in the plumbing of said apartment building in accordance with the plans, specifications and requirements." And further, that "the list so furnished will be in every way sufficient to complete the building and that no extra materials will be required."

It occurs to us that defendant undertook in every way possible to protect himself from a liability for extra materials. There is nothing in the contract that would indicate that the contractor had in mind an intention to rely upon a custom which at best does not grow out of the natural course of business conduct or public policy, but seems to be, if it exists at all, arbitrary and for the benefit of the contractor alone. To the layman it would seem that a contract providing for the supply of all material and all labor, and a stipulation that the work should be completed according to the plans and specifications, and that it was the intention of the parties that there should be no claims for extras, would be enough to protect an owner from just such a situation as has arisen in this case. Certainly the owner would not be bound by a custom unless it were clearly shown that he had contracted with reference to it, and, in the absence of such proof, a court ought to take the contract as the parties have made it and give it that construction which will protect the one who has contracted in belief that, when a plumbing job is "roughed-in," all there is to do is to set the fixtures and that this will complete the work.

We have looked over the plumbing specifications and we find nothing in them that would indicate to an owner that "roughing-in" meant one thing and "setting the fixtures" meant another thing, and that be-

tween the two there is room for extra work and extra material. On the contrary, the specifications seemed to indicate as clearly as language can express intention that the job was to be a finished job from beginning to the end.

Moreover, we think the trial judge misconceived the contract, in that he has in effect held that plaintiff was entitled to recover, and defendant was bound to pay, in any event, a sum equal to the contract price, whatever the amount of the material used might have been. We think the contract does not bind the defendant to pay the contract price, but rather, when the contract is considered in connection with the guarantee, it binds the plaintiff to do the work at a cost for material not exceeding the sum of $1,787.50, which was the total value of the materials listed at the time the contract was made, and which was represented to be all the material that was necessary and that no extra materials would be required. Therefore, when defendant paid for the materials which plaintiff says were necessary for the finish, he is entitled under the contract to counterclaim that sum against any balance due upon the contract price.

The court found that there had been no unreasonable delay in the performance of the work and denied the defendant a recovery on that account. He found, however, that the work was defective, and allowed a damage upon this item of $100. The allowance or disallowance of these items depend entirely upon the testimony, and while we are of the opinion that the court might have made a more liberal allowance for defective work and have made some allowance for delay, we are not prepared to say that his findings are not sustained by a preponderance of the evidence. Defendant also made claim of a credit of $25 which he says was paid to the brother of the defendant with his knowl-

edge and consent. The court found, and we believe his finding is sustained by the testimony, that the payment was not made on account of the contract, but was a personal transaction between the brother and defendant, and that no recovery can be had on that account.

Plaintiffs are entitled to recover the sum of $225, balance due upon their contract, and $50 attorney's fees for the foreclosure of their lien. Defendants are entitled to recover $235, the amount paid for extra materials, and the sum of $100 for defective work.

Judgment will be entered in favor of the defendant for the difference of $60. It is so ordered.

MAIN, C. J., MOUNT, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14593. Department Two. July 8, 1918.]

THE CITY OF SEATTLE, *Appellant*, v. JOHN E. SAVAGE *et al.*, *Respondents*.[1]

CRIMINAL LAW—COMPLAINT—AMENDMENT ON APPEAL FROM JUSTICE OF PEACE. Upon appeal from a conviction in justice court, if the complaint did not charge a crime, the prosecution may file a new complaint in the superior court upon which trial proceeds after arraignment and plea.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered June 23, 1917, dismissing a prosecution for the violation of an ordinance, upon sustaining a demurrer to the complaint. Reversed.

Hugh M. Caldwell and *Thomas J. L. Kennedy*, for appellant.

MACKINTOSH, J.—The refusal of the trial court to allow the filing of an amended complaint, upon an ap-

[1]Reported in 174 Pac. 1183.

peal from a conviction of the violation of a city ordinance in the police court of the city of Seattle, was directly contrary to our holding in the case of *Everett v. Cowles*, 97 Wash. 396, 166 Pac. 786, and for that reason, the judgment of the lower court is reversed.

MAIN, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14624. *En Banc.* July 8, 1918.]

THE STATE OF WASHINGTON, *on the Relation of the City of Seattle, Appellant*, v. PUBLIC SERVICE COMMISSION *et al., Respondents.*[1]

CARRIERS—DISCRIMINATION — CONSTITUTIONAL AND STATUTORY PROVISIONS. The constitutional and statutory provisions against discrimination by carriers, with the proviso (Rem. Code, § 8626-18) that nothing therein shall prevent the issuance of commutation tickets, give the carrier the right to issue temporary commutation tickets at its discretion.

CARRIERS—STREET RAILWAYS—REGULATION OF RATES—POWERS OF PUBLIC SERVICE COMMISSION — ABROGATION OF FRANCHISE — POLICE POWER. Under the public service commission act, Rem. Code, § 8626-53, authorizing the commission to fix reasonable rates and fares for carriers sufficient to yield a reasonable income, the commission has power to abrogate a preexisting franchise provision requiring the sale of commutation tickets at a certain price; since the city could not bind itself as against the state's exercise of the police power in fixing reasonable rates.

SAME — RATES — REGULATIONS — EVIDENCE — SUFFICIENCY. Relief from a franchise provision requiring a street railway company to issue twenty-five-ride commutation tickets for $1.00 without transfer privilege, is warranted where the proof showed that the company was not receiving any net returns, there was a deficit at the time of the hearing, and the returns of the company, not considering depreciation, were less than two per cent upon the actual cost of the railway system.

SAME—RATES—REGULATION—CONDITIONS PRECEDENT—VALUATIONS —STATUTES. Rem. Code, § 8626-92, providing that the public service commission shall "as early as practicable" ascertain the cost of

[1]Reported in 173 Pac. 737.

construction and equipment, does not require an independent valuation of a street railway system prior to fixing reasonable rates for passenger fares.

Appeal from an order of the superior court for Thurston county, Mitchell, J., entered November 16, 1917, affirming an order of the public service commission authorizing the discontinuance of the sale of commutation tickets as provided for in a street railroad franchise ordinance. Affirmed.

Hugh M. Caldwell, Walter F. Meier, and *Frank S. Griffith,* for appellant.

James B. Howe and *Hugh A. Tait,* for respondents.

MOUNT, J.—This appeal is from a judgment of the superior court of Thurston county, which affirmed an order of the public service commission permitting the Puget Sound Traction, Light & Power Company to substitute a five-cent fare per passenger in lieu of commutation tickets for $1 each, good for twenty-five rides.

The Puget Sound Traction, Light & Power Company operates a system of street railways in the city of Seattle pursuant to franchise ordinances granted by the city, which prescribed the terms and conditions on which such railways were constructed, maintained and are operated. Among the terms and conditions upon which franchises were granted was one relating to fares to be charged and commutation tickets to be issued by the grantees of such franchises as follows:

"Commutation Tickets: The grantees, their successors and assigns, shall keep on sale for one dollar ($1) each at their main offices and power stations within the city commutation tickets entitling the purchaser to twenty-five rides. Such tickets shall not be transferable nor entitle the owner to a transfer and the company may make such reasonable regulations in regard to the issue and use of the same as to enforce these provisions."

After these franchises had been granted, the legislature of the state of Washington enacted chapter 117 of the Laws of 1911, p. 538 (Rem. Code, § 8626-1 *et seq.*), relating to public service properties and utilities and providing for the regulation of the same, which act is commonly known as the public service commission law. It took effect on June 7, 1911. After that act took effect, the Seattle Electric Company, a predecessor of the Puget Sound Traction, Light & Power Company, filed with the public service commission a statement of fares as required thereby, item No. 2 of which statement specified a rate of fare of twenty-five tickets for $1, without transfer privilege, within the limits of the city of Seattle. Thereafter, on the 11th day of July, 1917, the Puget Sound Traction, Light & Power Company filed with the public service commission a statement of fares as follows:

"Item No. 2 providing 'Twenty-five (25) tickets for $1, without transfer privilege, within the limits of the city of Seattle' is cancelled entirely. This supplement has the effect of cancelling all fares within the city limits of Seattle that are less than five cents, except as shown in item No. 3 for school children."

Thereupon the city of Seattle filed a protest and complaint with the public service commission. In this protest and complaint the city took the position that the public service commission did not have authority to relieve the power company from complying with the franchise provision requiring the sale of commutation tickets as provided in the franchise ordinance. Thereafter the case was heard before the public service commission, and resulted in an order as follows:

"That the protest of the city of Seattle against the supplement to the Puget Sound Traction, Light & Power Company's passenger tariff, cancelling Item No. 2 of such tariff, which provides for the sale of twenty-five (25) tickets for one dollar ($1) without

transfer privileges within the limits of the city of Seattle, be and the same is hereby dismissed, and that said tariff supplement be permitted to go into effect immediately."

The city thereupon sued out a writ of review. Upon a hearing on this writ the lower court affirmed the order of the commission. This appeal followed.

Counsel for appellant divide their argument into four points, but these resolve themselves into two questions: First, has the public service commission power to authorize the discontinuance of the sale of commutation tickets provided for in the franchise? Second, if the public service commission has such power, is the proof sufficient to authorize the order?

Upon the first question, the appellant argues that, under the constitution and statute, the public service commission has no power to authorize the discontinuance of commutation tickets provided for in the company's franchise. The constitution, at § 15 of article 12, provides:

"No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, . . . Excursion and commutation tickets may be issued at special rates."

And at § 8626-18, Rem. Code, it is provided:

"No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; . . . And provided, further, that nothing herein contained shall prevent the issuance of mileage, commutation tickets or excursion passenger tickets: . . ."

This section of the constitution and this section of the public utilities act both refer to discriminating

charges, and the provision in each of these sections to the effect that excursion and commutation tickets may be issued at special rates was intended as an exception to these sections. The idea, no doubt, was that the privilege of the carrier to issue temporary excursion and commutation tickets was not to be taken away because such tickets might be held to be discriminatory. These sections leave the privilege with the carrier to issue such tickets at special rates at their discretion. Section 18 of article 12 of the constitution provides as follows:

"The legislature shall pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses and to prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads and other common carriers in the state, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established, and its powers and duties fully defined by law."

In pursuance of that provision, the public service commission act was passed. That act, in defining the powers and duties of the public service commission, provides:

"All charges made for any service rendered or to be rendered in the transportation of persons or property, or in connection therewith, by any common carrier, or by any two or more common carriers, shall be just, fair, reasonable and sufficient." Rem. Code, § 8626-9.

"Every common carrier shall file with the commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges and classification for the transportation of persons and property within the state between each point upon its route and all other points thereon; . . ." Rem. Code, § 8626-14.

"Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, as

herein provided, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier for the transportation of persons or property within the state or in connection therewith, or that the regulations or practices of such common carrier affecting such rates are unjust, unreasonable, unjustly discriminatory, or unduly preferential, or in any wise in violation of the provisions of law, or that such rates, fares or charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall determine the just, reasonable or sufficient rates, fares or charges, regulations or practices to be thereafter observed and enforced and shall fix the same by order as hereinafter provided. . . ." Rem. Code, § 8626-53.

In the case of *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D 78, L. R. A. 1915C 287, where the public service commission made an order directing a new schedule of rates for a telephone company which were higher than those fixed in the franchise theretofore granted by the city, we held that it was within the power of the state to regulate the rates by a commission under the public utilities act, authorizing the public service commission to fix reasonable rates and charges for public service corporations which are required to furnish adequate and sufficient service, and that the public service commission had power to require the telephone company to raise its rates above the maximum permitted by the city franchise. In that case we said:

"Rates cannot be arbitrarily fixed, but must be determined with reference to the conditions existing where they are to be put into execution. Manifestly a legislature could not, by special acts, fix these rates. The only practical method was—and it seems to have been foreseen by the makers of the constitution—to create a commission with power to ascertain what rate would be just and reasonable in each particular case, and to prescribe and enforce the same. *Interstate*

Commerce Commission v. Chicago etc. R. Co., 218 U. S. 88; *Interstate Commerce Commission v. Chicago etc. R. Co.*, 218 U. S. 113. The power thus exercised by the commission is not a usurpation of legislative and judicial functions, nor does it unite in one body conflicting governmental authority. It consists simply in the ascertainment of facts upon which the general rule of the legislative body, and of the constitution prescribing that reasonable rates shall be adopted, operates."

And further on in that opinion, at page 55, we said:

"The power to fix rates, if exercised by a city, unless that power is clearly expressed by legislative grant, is in the nature of a license, and is revocable at the will of the legislature when, in its judgment, the common good demands its reassertion. The state does not act by contract, but by grant, license, or reservation. It is not usually bound by the contracts of others when exercising its police power. So jealous is it of the sovereignty of its police power that, in the case of the *Home Tel. Co. v. Los Angeles* [211 U. S. 265], the supreme court of the United States held that a grant by the legislature of the state of the right 'to fix and determine charges for telephone, telephone service, and connections,' did not carry with it the right to *agree* upon rates. In other words, as that court and others have universally held, the delegation of power must be 'clear and unmistakable.' In dealing with the sovereign power of the people, nothing can be left to inference. The court accordingly said that the power to fix and determine rates being within the police power, the city might *establish* rates, but that it could not, under the delegation quoted, *contract* so as to bind itself or the other party as against the exercise of the police power. In principle its holding could not have been otherwise, for the strength of the police power lies in the fact that it is not a subject of contract; that it cannot be bartered or bargained away."

So it seems clear that, under the powers given to the public service commission and under that de-

cision, the city of Seattle could not, by contract or otherwise, fix a permanent rate which could not be regulated by the public service commission. While the right is reserved to the railway company to issue commutation tickets for temporary periods, the power of the public service commission to fix or authorize a reasonable rate for permanent service still remains. In the case of *State ex rel. Tacoma R. & Power Co. v. Public Service Commission,* 101 Wash. 601, 172 Pac. 890, we held that there was no power in the commission to relieve the railway company from certain franchise provisions, because there was no power vested in the commission to relieve from those provisions; but the provisions under consideration in that case did not relate to rates or fares as in this case. In the case of *Raymond Lumber Co. v. Raymond Light & Water Co.,* 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C 574, we said:

"The power to regulate and control the rates of public service corporations is within the legitimate exercise of the police power of the state. This power may be exercised by the legislature itself by enacting a law fixing rates, or the legislature may delegate the power to fix rates to a properly constituted commission, subject to judicial review. *State ex rel. Webster v. Superior Court,* 67 Wash. 37, 120 Pac. 861 [Ann. Cas. 1913D 78, L. R. A. 1915C 287]. In this state, the legislature has conferred the rate making power upon the public service commission by the public service commission law."

The statute (Rem. Code, § 8626-53) above quoted gives the control of rates and fares to the public service commission. Under that statute the power clearly rests in that commission to fix reasonable or sufficient rates at the request of the carrier, notwithstanding the franchise contract.

Upon the question whether the proof was sufficient to warrant the order of the public service commission, we think there can be no doubt. The evidence shows that the traction company and its street railway system were not receiving any net returns; that there was, in fact, a deficit at the time of the hearing, and, if depreciation is not considered or allowed for, the returns of the company would be less than two per cent upon the actual cost of the railway system. The trial court said:

"The findings and conclusions of the commission as to the facts are invested with the presumption of verity and no court would undertake to disturb them in this case. Respect is accorded to the judgment of those in whom the people by their own plan have placed it. It rather seems that petitioner is finding fault with the order complained of because the commission has never made its own independent valuation of the company's property and attention is called to § 8626-92, Rem. Code. The section provides: 'The commission shall ascertain, *as early as practicable,* the cost of construction and equipment, etc.' Obviously a valuation by the commission would be exceedingly helpful and dependable for rate-making purposes but surely this statute does not mean that the important work of rate control shall lie dormant until such expensive and arduous tasks shall have been completed. Especially not so in a case where by some other plan of determining valuation the commission is convinced it is entirely within the field of safety for the purposes of its order."

We are satisfied the trial court was right in its conclusion.

The order appealed from is therefore affirmed.

MAIN, C. J., CHADWICK, HOLCOMB, FULLERTON, PARKER, MACKINTOSH, and TOLMAN, JJ., concur.

[No. 14655. Department Two. July 8, 1918.]

LOUIS LUNDGREN, *Appellant*, v. PACIFIC COAST STEAMSHIP COMPANY, *Respondent*.[1]

MASTER AND SERVANT—ASSUMPTION OF RISKS—KNOWN DANGERS. An expert receiving shafting lowered into the hold of a ship and injured when the noose slipped because not clamped down, assumed the risk where he saw the particular load and knew the position of the chain was the same as on many previous loads, when he had taken precautions to avoid injury, and fully appreciated the danger, which was open and apparent.

SAME—ASSUMPTION OF RISKS—CONTINUING WORK AFTER COMPLAINT. In such case, the fact that the foreman on complaint gave instructions to get and use strands of rope yarn to prevent the slipping, does not relieve from the rule of assumption of risks, where the directions were disobeyed when the foreman left the scene, and plaintiff continued work without relying on any promise to remedy the conditions.

Appeal from a judgment of the superior court for King county, Jurey, J., entered September 15, 1917, upon granting a nonsuit, dismissing an action for personal injuries sustained by an employee in loading a ship. Affirmed.

Geo. B. Cole and *John Wesley Dolby*, for appellant.

Farrell, Kane & Stratton and *Stanley J. Padden*, for respondent.

MACKINTOSH, J.—Lundgren was a sailor employed by the Pacific Coast Steamship Company on its ship the "Ravelli," moored at the dock at Seattle. He was a member of what is known as the "hold-gang" at the time when the alleged cause of injury accrued. The duty of that gang at the time was to receive certain iron rods or shafting as they were unloaded from the dock to the ship and to stow them in the hold. These

[1]Reported in 173 Pac. 1023.

rods, or shafting, were four inches in diameter and about fifteen feet in length. They were swung from the dock into the hold by means of a sling, an appliance consisting of a common five-eighth's inch chain with a ring on each end, one of the rings being smaller than the other to permit it and the end of the chain attached thereto to pass through the larger ring, thus making a slip-noose to hold the load when placed around it. The noosing of the shafting was the work of longshoremen employed on a flat car on which the shafting was brought to the ship's side. The shafting, when noosed, was raised from the flat car and lowered into the hold by means of a winch operated from the ship's deck. It was the duty of the hold-gang to signal the winchman when he had lowered the shafting to about five feet from the floor of the hold; then they would place their hands upon the load and push it into its proper place for stowage, when the winchman would then further lower it, releasing the noose and swing the tackle back for another load. Each load consisted of about fifteen bars, of a weight of about two tons.

At the time of Lundgren's injury, he had been at work for about three hours or more; the shafting having been loaded and stowed away during this time in the same manner as the load which caused the injury. This particular load came into the hold and was stopped by the winchman at a position about five feet above the floor. Lundgren then ordered it lowered until one end rested on the hold bottom, thereupon placing his hands upon the shafting with the intention of swinging them into position immediately above the place of stowage. As he did so, the chain on the shafting, which had not been clamped down tightly, slipped, causing the load to roll and catch his fingers between the bars. He claims that, had the longshoremen

clamped the sling down close to the shafting, there would have been no slipping and "it would have never come down. That would not have dropped seven inches." Lundgren had time to see each load as it came into the hold and to notice the condition of the sling before he placed his hands upon the shafting. He testified that he saw the particular load in question coming in and directed its landing, and that he knew the position of the chain on the load. He knew that the chain and ring were in the same position they had been many times before, and that, when in that condition, the sling would slip and the shafting would turn. He was an expert in this work, having worked at it for many years, and he had, on other loads that day, used precautions to avoid injury on account of their condition.

He also testified that he had told the foreman in charge of the entire operation that "someone was going to get hurt," and that the foreman had ordered the longshoremen "to go and get some strands of rope yarn." "You have got to put something between that shafting." This was for the purpose of keeping the rods or shafting from rolling when lowered. After these directions of the foreman, the longshoremen continued to load as theretofore, paying no notice to the directions, and the foreman left the scene of the operation to attend to his duties on other parts of the dock. After his conversation with the foreman, Lundgren continued to receive loads sent in the same way as the previous ones, and unloaded from fifty to sixty more loads, taking about an hour's time, in the same way as he had done before his conversation with the foreman.

At the close of the appellant's case, the respondent challenged the sufficiency of the evidence to warrant its consideration by the jury, which challenge was sus-

tained, and from this disposition of the cause, the appellant prosecutes this appeal.

Among the affirmative defenses plead was that of assumption of risk, and, in our view of the facts, we are satisfied that this defense is fatal to the appellant's hope of recovery. All the conditions complained of by him were open, obvious and apparent, and all the dangers to which he was exposed were fully appreciated by him and he knew their imminency. From his years of experience, he was thoroughly familiar with the entire operation and understood each detail connected with it, and from his hours of work on this particular job, was absolutely acquainted with the dangers attendant upon the particular work in hand. His own testimony makes it apparent that he was in fear of the very thing which actually happened. Under these facts he must be held to have assumed the risk of these dangers which were open, obvious and apparent and which were necessarily incident to the work, and this is true even though these dangers may have resulted from the negligence of the employer; "the servant assumes all the ordinary risks of service and all the extraordinary risks, *i. e.*, those due to the master's negligence which he knows and the dangers of which he appreciates." 3 Labatt, Master and Servant (2d ed.), p. 3188, § 1186. See, also, *Engirbritson v. Tri-State Cedar Co.*, 91 Wash. 279, 157 Pac. 677; *Sainis v. Northern Pac. R. Co.*, 87 Wash. 18, 151 Pac. 93; *Kelly v. Cowan*, 49 Wash. 606, 96 Pac. 152; *Williams v. Spokane*, 73 Wash. 237, 131 Pac. 833; *Waterman v. Skokomish Timber Co.*, 65 Wash. 234, 118 Pac. 36.

The appellant, however, attempts to evade the operation of the rule of assumption of risk by establishing a promise by the foreman to alter conditions and by his assurance of safety. The evidence does not show any absolute promise to repair, nor does it disclose any

assurance of safety, nor did the appellant continue in the work relying upon the directions given by the foreman to the longshoremen, for he knew that those directions were not being followed, that no attention was being paid to them by the loaders, and that the foreman was not present to enforce them, and yet he continued under the unaltered conditions, unloading for an hour after the directions had been given and disobeyed. "A simple protest by the servant *not followed by the assurance that the difficulty will be remedied* will not place the responsibility upon the master." 4 Labatt, Master and Servant (2d ed.), p. 3854, § 1343; 26 Cyc. 1211; *Mattson v. Griffin Transfer Co.*, 90 Wash. 1, 155 Pac. 392. There having been no promise to repair, and the appellant not having been induced to continue the work relying upon the foreman's directions, there is nothing in the case to mitigate the full operation of the rule of assumption of risk, and, for that reason, the judgment of the lower court will be affirmed.

MAIN, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

[No. 14689. Department Two. July 8, 1918.]

W. P. LAWRENCE, *Appellant*, v. THE CITY OF TACOMA, *Respondent*, MICHAEL DOWD *et al.*, *Defendants*.[1]

TAXATION—FORECLOSURE OF CERTIFICATES—CONDITION PRECEDENT—PAYMENT OF LOCAL ASSESSMENTS. Rem. Code, § 7892-40, requiring the private owner of certificates of delinquency to pay in full all local assessments against the property, or acquire title subject thereto, before commencing action to foreclose the prior lien of the general tax, is a valid enactment that must be complied with.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 26, 1917, upon sustaining a demurrer to the complaint, dismissing an action to foreclose delinquency certificates. Affirmed.

W. L. Sachse, for appellant.

U. E. Harmon and *Frank M. Carnahan*, for respondent.

MOUNT, J.—In this case the lower court sustained a general demurrer to the plaintiff's second amended complaint. The plaintiff declined to plead further and the action was dismissed. This appeal followed.

The action is one to foreclose delinquent certificates for general taxes and for local improvements, held by the appellant. It appears from the complaint that the appellant, on July 18, 1912, purchased from Pierce county a delinquent tax certificate for general taxes delinquent for the year 1910 on a certain block in the city of Tacoma, and at the same time paid delinquent general taxes for the year 1911, and afterwards paid the taxes up to and including the year 1916. The aggregate of such taxes amounts to something over $1,-

[1]Reported in 173 Pac. 1017.

650. Between the years 1909 and 1913, the real estate upon which the general taxes were levied was included in certain local improvement districts, and assessments were made upon the land to pay for such improvements. All of the assessments for such improvements became delinquent, and the appellant, at different times, became the owner, by purchase from the city of Tacoma, of a number of these delinquent certificates for local improvements, aggregating, with interest, about $3,000. E. J. McNeeley, one of the defendants, purchased two of such certificates amounting to $375. The city of Tacoma is the holder of other certificates of delinquency for unpaid assessments aggregating about $3,000. McNeeley and the city of Tacoma were made parties defendant. It is further alleged in the complaint that the real estate is not of sufficient value to satisfy the general taxes and the local improvement assessments, and that the local improvement assessments are inferior liens to general taxes. The complaint prays that the land be sold for general taxes for the year 1910, subject to subsequent taxes, and that successive sales be made each year, subject to the last assessment for general taxes. The complaint does not show that the appellant has paid in full all the local assessments against the land or any part thereof, and the appellant does not seek to acquire title to the property subject to the local assessments.

This case is controlled by the case of *Holzman v. Spokane,* 91 Wash. 418, 157 Pac. 1086. That was a case where the plaintiff sought to foreclose a certificate of delinquency for general taxes as a superior lien to that of local assessment liens without proceeding as required by § 7892-40, Rem. Code. In that case we held that the section of the statute was a valid enactment "with which respondent must comply in the

foreclosure of his general tax certificate of delinquency."

That statute provides that, before commencing any action to foreclose the lien of a delinquent tax certificate, the plaintiff must pay in full all local assessments outstanding against the property, or proceed to acquire title to such property subject to certain or all local assessment liens thereon. It is plain from the complaint in this case that the appellant seeks to do neither of these things, but is claiming that the general taxes are superior liens to the local improvement assessments. It is plain from the wording of the statute that, before a foreclosure of a certificate of delinquent taxes may be had by a private owner thereof, it is necessary to pay local improvement assessments, and *vice versa*. This case is controlled by the *Holzman* case, *supra*.

The judgment is therefore affirmed.

MAIN, C. J., HOLCOMB, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14274. *En Banc.* July 9, 1918.]

PEARL PARKHURST, *Appellant*, v. JOHN J. ELLIOTT *et al.*, *Respondents.*[1]

FRAUD—DECEIT — EXCHANGE OF PROPERTY — MEASURE OF DAMAGES. The measure of damages for deceit in misrepresenting the value of mortgage securities, traded for plaintiff's property, is the difference between the actual value of the securities and their value as represented.

APPEAL—REVIEW—MATTERS NOT NECESSARY TO DECISION. Upon affirming the grant of a new trial to plaintiff for error in certain instructions to the jury, the supreme court will not consider defendant's objection to the sufficiency of the evidence to sustain any verdict.

Appeal from an order of the superior court for King county, Albertson, J., entered January 31, 1917, granting a new trial, after the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Affirmed.

Walter A. Keene and *Will H. Thompson*, for appellant.

McClure & McClure (*Walter S. Osborn*, of counsel), for respondents.

MOUNT, J.—This appeal is from an order of the lower court granting a new trial after verdict of a jury. The plaintiff has appealed.

The facts are, in substance, as follows: In May, 1915, the appellant was the owner of a house and lot in the city of Seattle. This property, valued at $3,500, was listed with a real estate agent for sale, subject to a mortgage of $950. At that time Alfred E. Hart and wife were the holders of a note for $2,560, executed by Robert A. Campbell and wife and Susan S. Shaw to Zener-Hilt Company. This note was secured by a sec-

[1]Reported in 173 Pac. 731.

ond mortgage upon 19.83 acres of land in Okanogan county. The note and mortgage were dated July 15, 1914, and matured on or before three years from date. Mr. Hart had placed this note and mortgage in the hands of one John J. Elliott for sale or trade. The agent for appellant and the agent for Hart and wife came together and arranged an exchange of properties. It was agreed that appellant's house and lot were of the value of $3,500, less the mortgage thereon, making an equity of $2,550. It was agreed that Mr. Hart's note and mortgage, with interest, were of the value of $2,730. It was agreed that appellant should pay the difference in cash and the exchange of the properties should be made. This was done. Afterwards, when an interest payment due upon the note and mortgage was not paid, appellant declared the whole sum due and proceeded to foreclose the mortgage in Okanogan county. The property was sold upon foreclosure and bid in by the mortgagor for $2. Susan Shaw, one of the makers of the note, was not served in the foreclosure and did not appear therein. A deficiency judgment was taken against Campbell and wife for the balance due on the judgment after being credited with the $2. Thereafter this action was brought to recover damages for the loss sustained on account of the alleged fraudulent representations as to the value of the securities made by the agent, Mr. Elliott, prior to the time the trade was made.

The respondents, in answer to the complaint, denied the allegations of fraud and deceit, and alleged affirmatively that appellant did not rely upon representations that were made, but made independent investigations of her own as to the value of the property securing the note and mortgage. Upon these issues the case was tried to the court and a jury. A verdict was returned in favor of the appellant in the sum of $2,-

852.29. Upon the return of the verdict, the respondents filed a motion for judgment notwithstanding the verdict and for a new trial. The trial court denied the motion for judgment *non obstante* and granted the motion for a new trial, upon the ground that an instruction to the jury upon the measure of damages was error. The instruction upon the measure of damages given by the court to the jury was as follows:

"So you will inquire from all of the evidence in the case, if you should find that the plaintiff was entitled to recover at all, what was the comparative market value of these two properties at the time of the exchange and if the value of the property of the plaintiff was in excess of the value of the note and mortgage which she received in exchange for it, then your verdict would be for the plaintiff in the amount of such excess, and in the amount of the further payments which the complaint charges she made to the defendant Hart, to the extent that such further payments may be established by the evidence to your satisfaction."

At the time of the trial, the respondents requested the court to give two instructions as follows:

"The jury are instructed that, if you find that plaintiff is entitled to recover in this case, the measure of damages would be the difference between the value of the property sold or exchanged to her at the time of such sale or exchange, and what its value would have been, had it been as represented."

"The jury are instructed that one who is induced to buy a mortgage or exchange property therefor by fraudulent representations as to the value of the property covered by it and the responsibility of the indorsers of the note thereby secured, may recover the difference between the actual value of the securities and their value as represented. The rule would mean a sum equal to that portion of the mortgage debt which the securities when properly applied thereto will fail to pay, on the hypothesis that, if they had been as represented they were adequate to pay the whole debt."

The court refused to give these instructions, but gave the one first above quoted; and, concluding that he was in error in this respect, granted the new trial.

Appellant insists that the instruction defining the measure of damages given by the court was correct, based upon the rule in *Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458, 50 Pac. 55, where it was stated (p. 482) that the correct rule for assessment of damages is:

"The difference between the whole purchase price paid and the actual value of the whole property at the date of sale."

That rule has not been followed in later cases. It has not been noticed, but has been in substance over ruled. In the cases of *Walsh v. Meyer*, 40 Wash. 650, 82 Pac. 938; *West v. Carter*, 54 Wash. 236, 103 Pac. 21; *Hunt v. Allison*, 77 Wash. 58, 137 Pac. 322; and *Stanton v. Zercher*, 101 Wash. 383, 172 Pac. 559, this court has followed the great weight of authority and laid down the rule for the measure of damages in cases like this to be the difference between the value of the property transferred at the time of sale and what its value would have been if as represented. So it is apparent that the court was right in granting the motion for a new trial upon the ground that the instruction given was error. That there may be no doubt upon the question hereafter, the rule in *Tacoma v. Tacoma Light & Water Co., supra,* is now, in so far as it states the rule for the measure of damages in cases of this kind, overruled.

The respondents insist that the court erroneously denied a motion for a judgment *non obstante,* and urge that we should now direct a judgment upon the facts in the case. In *Rochester v. Seattle, Renton & Southern R. Co.*, 75 Wash. 559, 135 Pac. 209, a case where a new trial was granted by the lower court and, on

appeal to this court, the order granting a new trial was reversed and the lower court directed to enter a judgment upon the verdict, an appeal from that judgment was taken to this court. We there overruled a number of cases in which we had held that, where the motion for a new trial was granted upon a specific ground, this court, upon appeal, would consider only the ground stated by the trial court for its ruling, and would not consider other grounds covered by the motion. We said:

"The correct rule of practice is now announced to be that, where, upon the consideration of a motion for new trial, the trial court enters an order granting the motion upon a specific ground or for a specific reason stated, and the adverse party appeals, the party seeking to sustain the order may urge in this court all the grounds which were covered by his motion, and is not limited to the specific ground or reason upon which the trial court based the order."

Under the rule in that case, if we were now to conclude that the trial court properly instructed the jury, we would then consider the other grounds of the motion for a new trial; but we have concluded that the trial court was right in granting the motion for a new trial, and it is, therefore, not necessary to consider other questions presented upon the motion for a new trial.

The case will go back and be retried. If final judgment shall go against the respondents they may then question the sufficiency of the evidence. For that reason we now decline to pass upon the question presented by the respondents to the effect that the trial court should have granted the motion for judgment notwithstanding the verdict.

The order appealed from is affirmed.

ALL CONCUR.

[No. 14599½. Department Two. July 9, 1918.]

W. B. JORDAN *et al., Respondents,* v. L. V. PEEK, *Appellant.*[1]

SALES—CONDITIONAL SALES — CONTRACTS — CONSTRUCTION. A contract to take over a stock of merchandise constitutes a conditional sales contract, where the buyers agreed to purchase the stock at a future date and meanwhile in disposing of the stock and carrying on the business, to act as agents of the sellers, who were guaranteed against loss and were entitled to hold the buyers to payment of the full purchase price, whereupon the contract "shall then become a full, complete and executed bill of sale."

SALES—CONDITIONAL SALES — REMEDIES — ELECTION. A provision in a conditional sales contract giving the vendors the right to take over the stock and apply the proceeds on the purchase price and maintain suit for the balance, is contrary to law and to Civ. Code, S. D. § 1314, there being only a choice of remedies; and having elected to take the property, the vendors cannot recover the unpaid balance of the purchase price.

Appeal from a judgment of the superior court for King county, Jurey, J., entered November 7, 1917, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Reversed.

Lane & Thompson, for appellant.

J. E. McGrew, for respondents.

MACKINTOSH, J.—The respondents, a partnership doing business as W. B. & W. G. Jordan, seek recovery against the appellant, L. V. Peek, as guarantor of a note in the sum of $4,555.44, executed in a transaction between the parties hereto and A. W. and C. G. Lindquist, doing business as Lindquist Brothers.

Lindquist Brothers were the owners of a certain general mercantile business at Diamond, South Dakota. Sometime prior to December, 1911, the firm of Lind-

[1]Reported in 173 Pac. 726.

quist Brothers went into bankruptcy, a trustee being appointed in the bankruptcy proceedings. On December 29, 1911, W. B. and W. G. Jordan purchased of the trustee a stock of goods of the bankrupt firm for $4,555.44, the amount of the note here sued upon, the Lindquists agreeing to purchase from the Jordans on or before December 29, 1912, the said stock for the above mentioned sum of $4,555.44, together with interest thereon at the rate of six per cent per annum from the date of purchase till paid. It was agreed that the stock should be paid for in full on or before December 29, 1912. This contract was entered into at Diamond, South Dakota. In addition to the foregoing, paragraph 3 of the contract stipulated as follows:

"The first and second parties agree that the said second parties shall act as the agents of the first parties in selling and disposing of said goods, wares and merchandise, and in collecting said accounts at the store formerly occupied by Lindquist Brothers in Diamond, South Dakota, and that said second parties, as the agents of the first parties, shall conduct and carry on said business for and in the name of said first parties, or such other name as the said first parties shall designate, until December 29, 1912, or until the said second parties shall have paid to said first parties the full purchase price of said property, with interest thereon."

Then follow recitals as to the conduct of the business as "agents," paragraph 7 of the contract then providing as follows:

"In case the said second parties shall not elect to take over said goods, wares and merchandise, furniture, fixtures, accounts and other property, as herein described, before the 29th day of December, 1912, they, the said second parties, shall on said 29th day of December, 1912, be obligated to take over all such remaining property, accounts, etc., and to pay to said first parties the full purchase price therefor, as herein

stated, and the said first parties shall on said 29th day of December, 1912, be entitled to demand of and receive from said second parties the full purchase price hereof, with interest as herein provided, and this transaction shall then be and become a full, complete, and executed bill of sale of all said property to said second parties."

Paragraph 12 of the contract reads as follows:

"In case either of said second parties should for any reason decline to go on with said business, or should cease to be actively engaged, in said business, then said first parties may at their election close out all remaining property, accounts, etc., and apply the proceeds therefrom on the said purchase price, and immediately recover from said second parties the balance remaining due on said purchase price."

Paragraph 13 of the contract reads as follows:

"It is the true purpose and intent of this contract that said second parties shall take over said stock of goods, and all other property herein referred to on or before December 29, 1912, on the terms herein provided for, and in any event, to guarantee said first parties against any loss, cost, or damage which, under any circumstances may result to them by reason of their purchase of said stock and other property and the execution of this contract."

As a part of this transaction, the note here sued upon was executed by Lindquist Brothers to the Jordans, with the appellant, Peek, as guarantor, in the following notation to the contract above mentioned:

"In consideration of the sum of one (1) dollar to me in hand paid by the above named W. B. and W. G. Jordan, and for other good and valuable considerations, I, the undersigned, do hereby guarantee the due performance of the foregoing contract by, and on behalf of the said second parties, and also do hereby guarantee the prompt payment of the full purchase price therein named, on or before December 29, 1912."

In December, 1912, after one year's conduct of the business under the terms of the foregoing agreement, Lindquist Brothers were unable to pay for the stock as agreed, and secured an extension of another twelve months for such payment. At the end of the second year they were still unable to pay the Jordans, and obtained still another extension for one year more. In July, 1914, and while the business was being conducted by the wives of the Lindquists in the protracted absence of their husbands, the Jordans, without process of law, seized the stock then remaining on hand in the store in Diamond, South Dakota, together with certain stock added thereto by the Lindquists in their conduct of the business. No accounting was had between any of the parties, save for certain credits allowed after the commencement of this action, and no suit has been instituted by the Jordans against any other than Peek, the guarantor. An action brought by the respondents against Peek in the superior court for King county, as guarantor, resulted in a judgment for the respondents in the sum of $3,457.26, from which Peek has appealed to this court.

Appellant's argument in general is that, according to the terms of the contract above set forth, the relation of principal and agent between the Lindquists and the Jordans was created, and that the transaction was not one of outright purchase and sale, but amounted to a conditional sale. He further argues that, regarding the contract as a conditional sale, the seizure by the Jordans of the stock in the store at Diamond, without process of law, was contrary not only to the requirements of the statutes of South Dakota controlling such conditional sales, but also to the settled rule laid down by the courts. He also contends that the respondents never accounted for the entire stock of

goods taken by them, that they have attempted to account only for that portion of the stock which they considered part of the original stock, and that they have taken the money which came in in the course of the business and applied it on new goods purchased from them, and that, when they seized the goods and took them to their place of business in Minnesota and there sold them, out of the proceeds they paid themselves for new stock furnished the South Dakota store and applied the balance realized on the sale on the purchase price of the stock covered by the contract here under consideration.

The interpretation sought to be given to the contract by the respondents is rather difficult to grasp. At times it appears to be that the contract amounted to an absolute sale; at other times, that it is in the nature of a conditional sale. The contract, it appears to us, is not subject to any other interpretation than that it was one of conditional sale. The second and third paragraphs provide explicitly that the Lindquists agreed to purchase at a future date, and, in the meantime, should act as the agents of the Jordans in selling and disposing of the stock and carrying on the business in the Jordans' name until the Lindquists "shall have paid to said first parties the full purchase price." Several paragraphs are taken up with provisions as to the conduct of the business by the Lindquists as Jordans' agents, which include the payment of salaries to the Lindquists. As we view it, there is nothing contained in paragraphs 7 and 13 inconsistent with this interpretation; the agreement that the true purpose and intent of the contract is that the Lindquists should take over the stock of goods on December 29, 1912, on the terms provided in the contract, and to guarantee the Jordans against any loss which might result to them by reason of their purchase of the stock from the

trustee in bankruptcy, is accordant with the other provisions of the contract. The Lindquists were engaged to take and pay for the stock in December, 1912, and the respondents could have held them to the engagement, and if they had done so then (or at the expiration of the time as extended), the respondents would have been "entitled to demand and receive the full purchase price thereof, and this transaction shall *then* become a full, complete and executed bill of sale." Paragraph 13 recites that the Lindquists should take the property on the terms "provided for," which were that the title should not pass until payment had been made. It was intended that the contract should result in a completed sale in December, 1912, or at a later date to which both parties had agreed that the contract should be continued.

If this was a conditional sale, the respondents, upon the breach by the Lindquists of their promises, had the election of either one of two remedies; (a) a suit for the balance due under the contract, or (b) a taking of the stock. Even though the contract may have provided, as it does in paragraph 12, that, upon the breach by the Lindquists, the respondents could take all the stock and apply the proceeds on the purchase price and maintain suit for the balance thereof, the two remedies cannot be thus jointly pursued. The provision for taking possession and also suing for the balance due is contrary to § 1314 of the code of civil procedure of South Dakota, which provides:

"If a buyer of personal property does not pay for it according to the contract, and it remains in possession of the seller after payment is due, the seller may rescind the sale or may enforce the lien for the price in the manner provided in the title on liens."

Not only is it contrary to statutory provision, but it is in conflict with the great weight of judicial author-

ity, including the decisions of our court, for we have held:

"While a vendor in a conditional sale has a choice of remedies—that is to say, he may disaffirm the sale by retaking the property, or he may affirm it by suing to recover the balance of the purchase price—the rule is general that he cannot exercise both remedies. He cannot retake the property and then recover the purchase price, even though the contract may so expressly provide; this, on the principle that to retake the property is to rescind the sale, and hence, there is no consideration to uphold the promise to pay for it." *Jones v. Reynolds,* 45 Wash. 371, 88 Pac. 577.

In the case of *Stewart & Holmes Drug Co. v. Reed,* 74 Wash. 401, 133 Pac. 577, we held:

"The law is well settled that where, as in this state, the title retained by the seller on conditional sale is an absolute title, on a breach of the conditional sale by the buyer, the seller has a choice of remedies. He may either disaffirm the contract and retake the chattel, or he may treat the transaction as an absolute sale and sue on the contract for the purchase price. But since these remedies are inconsistent, he cannot do both. The assertion of one is an abandonment of the other . . . Such an election may be invoked by a third person as a defense to an attempted assertion of the alternative remedy against him."

See, also, *Eilers Music House v. Douglass,* 90 Wash. 683, 156 Pac. 937, L. R. A. 1916E 613.

The respondents, having elected to take the property, cannot now repudiate their choice and receive the unpaid balance of the purchase price.

The judgment of the lower court is reversed and the action dismissed.

MAIN, C. J., HOLCOMB, MOUNT, and CHADWICK, JJ., concur.

[No. 14637. Department One. July 9, 1918.]

A. U. HERRETT, *Appellant*, v. PUGET SOUND TRACTION, LIGHT & POWER COMPANY, *Respondent*.[1]

STREET RAILWAYS—ACCIDENTS AT CROSSINGS—AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The driver of an automobile, struck by a street car at a street intersection, was guilty of contributory negligence, notwithstanding he testified that he looked and did not see the street car, which was in full view, where he deliberately drove onto the tracks and had time to avoid the collision by stopping if he had taken notice of the street car.

Appeal from a judgment of the superior court for King county, Jurey, J., entered September 18, 1917, upon granting a nonsuit, dismissing an action in tort. Affirmed.

Winter S. Martin and *Ray M. Wardall*, for appellant.

James B. Howe and *H. S. Elliott*, for respondent.

TOLMAN, J.—Action to recover for personal injuries sustained in a collision between the appellant's automobile and a street car operated by the respondent. At the conclusion of the appellant's evidence, the trial court, upon motion of the respondent, granted a nonsuit, from which this appeal is prosecuted.

The evidence shows substantially the following state of facts: The appellant had removed to a point in the city of Seattle, somewhat north and beyond the place of the accident, a few days before his injury, and was not very conversant with the streets upon which the street cars were operated in that part of the city. On the morning of February 24, 1916, the appellant was driving his automobile south on the right-hand side of Stone Way, which is a north and south roadway and

[1]Reported in 173 Pac. 1024.

one of the main thoroughfares for north and south traffic in that particular district of Seattle. North Forty-fifth street runs approximately east and west, crosses Stone Way substantially at right angles, and respondent operates thereon its outgoing Green Lake car line, running single and electric street cars thereon weighing between forty and fifty thousand pounds. Stone Way is ninety feet wide, and North Forty-fifth street is seventy feet wide between property lines. Stone Way is divided by a parking strip in the center, leaving an eighteen and one-half foot roadway on each side. At the northwest corner of the intersection of these streets there is a store building, extending to the property line on Forty-fifth street, and having a frontage on Stone Way of approximately fifty feet. North of this building is a garage built in an L shape, having a frontage on Stone Way of approximately forty feet, and also a frontage on North Forty-fifth street to the west of Stone Way. As appellant drove south on Stone Way, at about seven o'clock in the morning on the day in question, on the west or right-hand side of the street, and approached the intersection of North Forty-fifth street, passing the garage, he slowed down to twelve or fifteen miles an hour, sounded his horn, looked to the right when he reached the corner, says he saw no car coming, and continued on directly south in a straight line across the car track, at which point he was struck by a Green Lake car operated by the respondent, and received the injuries complained of; his automobile being struck approximately in the center, and carried by the momentum of the car to a point variously estimated at from forty-five to seventy feet from the point of impact.

The appellant assigns error upon the granting of the motion for nonsuit, and the judgment dismissing his case, and relies upon the case of *Richmond v. Tacoma*

R. & Power Co., 67 Wash. 444, 122 Pac. 351, for a reversal. In that case, Judge Parker, speaking for the court, says:

"The evidence being sufficient to warrant the jury in believing these facts, argument seems unnecessary to demonstrate that the question of appellant's negligence was for the jury to determine. The speed of the car, the presence of the street crossing, the presence of the other car stopped at the crossing to let off and take on passengers, the delay in any attempt to check the speed of the car until it was practically upon the crossing at the side of the other car, and the delay in giving any signal of its approach until about that time, it seems to us leaves nothing to be argued upon the question of the appellant's negligence, except such argument as might be properly addressed to the jury. Clearly, this branch of the case does not present a question of law for the court to decide."

Not so here. In this case there was no direct evidence of excessive speed. The appellant does not attempt to say at what speed the street car was traveling, as he says he saw it only when it was upon him. None of the witnesses who were in the garage attempted to say more than that the street cars at that point usually approached at about twenty miles per hour. And the witness Carson, who was four hundred to five hundred feet east of the point of collision, traveling west directly toward the approaching street car, testified that his head was down, that he saw neither the street car nor the automobile until his attention was attracted by the crash of the impact; then looking up, he saw the street car still moving toward him carrying the automobile on its fender; and more from the distance he thought it traveled before being brought to a stop than from what he could observe of its movement, he expressed the opinion that the street car was traveling at twenty-five to thirty miles per hour at the time of the collision, which he did not

see. We think the only evidence in the case from which the jury might have found that the street car exceeded the lawful rate of twenty miles per hour was the evidence that it traveled from forty-five to seventy feet after the impact before being brought to a stop. In the light of the many elements besides that of the speed at which it was traveling, which might enter into and affect the stopping of the street car, it may reasonably be held that, from such evidence, a finding by the jury would be a mere speculation or guess. Nor have we, as in the *Richmond* case, any evidence of another car passing or stopping upon a parallel track. Such fact, with the necessity for checking the speed of the approaching car to avoid injury to persons alighting or about to board the standing car, was the very foundation of the decision in the *Richmond* case.

In the case at bar, the appellant says:

"I knew there was a street car crossing on that street there, but just exactly where that location was, until I came to it, I could not say that I did know."

With this much knowledge, and the street car track itself to bring home the knowledge, the appellant, according to his own testimony, and all of the physical facts in the case, drove down Stone Way at a speed of twelve to fifteen miles an hour, sounded his horn shortly before reaching the corner, looked, he says, for the approaching car as he cleared the building on the corner, and seeing nothing, continued to drive forward over the intervening forty feet. What was the effect of this testimony? It is not alleged or claimed that the street car was traveling in excess of thirty miles an hour. The view from the corner was wholly unobstructed. There was no fog. And the light at that hour, 7 a. m. on that morning, according to all of the witnesses, was good. The street car, even if traveling at a speed of thirty miles an hour, could not have

been more than eighty to ninety feet away. The appellant, as he says, could have stopped his automobile within its own length. And in the light of all of these facts, even admitting that the street car gong was not sounded, of which fact the evidence is negative, to say the least, can the minds of reasonable men differ? Must not all say that the appellant either did not look for the approaching car, or his mind was so intent upon other things that the fact of its approach, physically open and apparent as it was and must have been, made no impression upon him? In either event, were not his acts so palpably negligent that there can be no two opinions concerning them? No reason or excuse is offered for appellant's failure to see the street car and avoid the collision, except that, after having looked, as he says, when he passed the corner of the store building, he then gave his attention to his machine. This will not do. A driver of an automobile may not deliberately drive upon the street car track which is open and apparent, and excuse himself by saying that he looked and did not see that which no one could avoid seeing if he had looked; or that he was giving his attention to his machine, when common prudence demanded that he give some part of his attention to his own safety.

We think all of the testimony in this case, coupled with the physical facts which cannot be denied, bring it strictly within the rule as to contributory negligence laid down by this court in the following cases, among others: *Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488; *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458; *Stueding v. Seattle Elec. Co.*, 71 Wash. 476, 128 Pac. 1058; *Bardshar v. Seattle Elec. Co.*, 72 Wash. 200, 130 Pac. 101; *Brown v. Puget Sound Elec. R. Co.*, 76 Wash. 214, 135 Pac. 999; *Bow-*

den v. Walla Walla Valley R. Co., 79 Wash. 184, 140 Pac. 549; *McEvilla v. Puget Sound Traction, Light & Power Co.*, 95 Wash. 657, 164 Pac. 193.

For the reasons given, the judgment is affirmed.

MAIN, C. J., FULLERTON, PARKER, and MITCHELL, JJ., concur.

[No. 14743. Department One. July 9, 1918.]

In the Matter of the Estate of BONHAM GALLAND. JESSE A. GALLAND *et al., Appellants,* v. SEATTLE TRUST COMPANY *et al., Respondents.*[1]

PERPETUITIES—CHARITABLE BEQUESTS—IMMEDIATE GIFT. A bequest of a trust fund to establish an orphanage vests immediately, and the rule against perpetuities does not apply, where the bequest was to a trustee to invest the fund for the establishment of the home, and appointed five trustees as a managing board to have charge when, by its own accumulations or by other contributions, the fund reached a certain sum, which was to be a perpetual benefaction without condition or restriction.

Appeal from an order of the superior court for King county, Davidson, J., entered September 14, 1917, upon sustaining a demurrer to the petition, dismissing proceedings for the construction of a will. Affirmed.

Beeler & Sullivan and *Samuel E. Kenney,* for appellants.

Aubrey Levy, for respondents.

TOLMAN, J.—This is an appeal from an order of the superior court for King county, sustaining the respondents' demurrer and dismissing the appellants' petition for the construction of the will of Bonham Galland, deceased.

The proceeding was brought by the appellants for the purpose of obtaining a construction of the last

[1]Reported in 173 Pac. 740.

will and testament of Bonham Galland, deceased, and seeking to have the residuary devise and bequest in said will declared void on the ground that it violates the rule against perpetuities. The appellants are the heirs at law of Bonham Galland, and will inherit the property attempted to be disposed of by the residuary clause, if such clause be held void.

The will under consideration was executed on June 2, 1915, and the testator having died in the meantime, the will was admitted to probate on the 10th day of November, 1915, by the superior court of King county. The will, after providing for certain definite and specific bequests of money and personal effects, and for the payment of the inheritance tax upon all such bequests, proceeds to dispose of the residue, and probably the great bulk of the estate, in the following language:

"First. I give, devise and bequeath unto the Seattle Trust Company, a corporation of Seattle, Washington, and to its successors, all the rest, residue and remainder of my property and estate of whatsoever kind or character and wheresoever situated, owned by me at the time of my death, with as full and ample power, authority and discretion as I would have if living, to hold, control and manage, to bargain, sell, convey, mortgage, lease, or otherwise to manage, control, dispose of, settle and distribute the same, or any part thereof, or any interest therein, with or without notice, in one or more parcels, at such times and for such prices as in its judgment shall be deemed for the best interests of my estate, beneficiaries and legatees, and I expressly relieve any and all purchasers of any duty or liability as to the proper application of the proceeds or moneys paid to my said trustee, all in trust however, to and for the following uses and purposes, that is to say:

"Second. It is my will and I hereby order, direct and empower my said trustee to invest said fund in interest bearing securities, and the trust fund hereby

created shall be known as the Bonham Galland Trust; to be used for the establishment of a shelter for orphans and homeless Jewish children, to be located in Seattle or vicinity, as hereinafter more particularly mentioned.

"Third. I hereby constitute and appoint five members of the Temple de Hirsch, to be selected at any regular meeting of the said Temple de Hirsch, as a managing board to have charge of said trust fund when the same shall by its own accumulations or by other contributions thereto, aggregate, inclusive of the four acres of land that I now own at Orchard Beach, the sum of fifty thousand dollars ($50,000), and thereupon the said trust company shall deliver to said managing board all of said trust fund, less the proper and legitimate fees for administering the same, and upon such delivery said trust shall cease. The receipt of the president of the Temple de Hirsch, who shall be *ex-officio* president of said managing board, shall be a full discharge of the said trust company, and the said trust company is hereby directed that, when the president of the said Temple de Hirsch shall certify to it that the said managing board have secured other donations to said trust fund, which donations, together with the trust fund, aggregate fifty thousand dollars ($50,000), such certificate shall be full authority for delivering the accumulations of said trust fund to said managing board and closing said trust.

"Fourth. It is my will and I hereby order and direct the said managing board when it shall come into possession of the said trust fund to use the same towards a shelter for orphan and homeless Jewish children in such manner as to said managing board seems best from time to time. It is my desire that said trust fund shall be safeguarded and protected as far as may be so as to be a perpetual benefaction to the unfortunate class which it is my desire to hereby benefit.

"I hereby direct the said trust company to report annually to the Temple de Hirsch the financial condition of said trust fund, to aid and guide the said Temple de Hirsch in gathering such additional funds as may make the said trust fund operative.

"If at any time it should seem best to utilize my four acres of land at Orchard Beach as a site for such home or shelter the same may be so used, or if it should be deemed best to sell the same and use the funds therefor, I direct that this be done; all this, however, I leave to the good judgment of my said trustee."

The appellants' petition is directed specifically to the paragraphs of the will quoted, and prays that the attempted gift of the residue of the decedent's estate may be declared void, and that the executor be ordered to administer upon and distribute the residue as though the decedent had died intestate, upon the theory that the quoted portion of said will is void under the rule against perpetuities.

It may be admitted in the beginning, as is said by the appellants, quoting from Gray, The Rule Against Perpetuities (3d ed.), p. VII:

"The doctrines derived from the feudal law, which so closely limited the creation and transfer of future estates, have passed or are fast passing away. Any reasons for their existence have gone, and under the joint action of the legislatures and courts they have themselves almost disappeared. Of all that forest of learning there remains here and there only a stump over which an unlucky testator may stumble. But the rule against perpetuities is in full vigor; where the legislature has interfered, it has been to increase its stringency. Indeed, the rule is substantially, at the present day, *the* law of future interests."

Professor Gray, in his admirable work, The Rule Against Perpetuities (3d ed.), § 591, says:

"But the rule against perpetuities is not directed at preventing the alienation of present interests, but against the creation of remote future interests."

And adds, in a foot note, that the rule should be known as the rule against remoteness.

The appellants seem to contend that the will, by its terms, creates one trust in the Seattle Trust Company for purposes of accumulation, and another and subsequent trust to take effect only upon the termination of the first trust, in the final managing board, to be selected under paragraph third of the quoted provisions of the will, the last trust being for the purpose of erecting and maintaining a home for orphans and homeless Jewish children.

Let us examine the language in the will to discover, if we may, the testator's intention. In paragraph first, after the usual language to constitute a bequest and describe the property, and the method of handling and disposing of it, the testator says:

". . . all in trust, however, to and for the following uses and purposes, that is to say:

"Second. It is my will and I hereby order, direct and empower my said trustee to invest said fund in interest bearing securities, and the trust fund hereby created shall be known as the Bonham Galland Trust; to be used for the establishment of a shelter for orphans and homeless Jewish children, . . ."

And in paragraph third, after providing for the appointment of five members of the Temple de Hirsch:

". . . as a managing board to have charge of said trust fund when the same shall by its own accumulations or by other contributions thereto, aggregate, inclusive of the four acres of land that I now own at Orchard Beach, the sum of fifty thousand dollars ($50,000), and thereupon the said trust company shall deliver to said managing board all of said trust fund, less the proper and legitimate fees for administering the same, and upon such delivery said trust shall cease. . . ."

It will be seen that the will does not in any manner provide that this trust fund shall or may be used for anything but the particular charity specified, and does

not appear to recognize any possible contingency or event the happening of which could prevent the use of the fund as intended. There is no other residuary clause or provision by which in any event the fund, or any part thereof, may pass to others at any time, near or remote. The words "said trust shall cease," quoted from paragraph third, may, on the first reading, be misleading. But if they were intended to mean anything more than that the duties of the Seattle Trust Company shall cease upon turning over the fund to the permanent board, then they would be wholly inconsistent with the remainder of the will. They cannot mean that the Bonham Galland Trust, which has thereinbefore been established with such particularity, shall cease, because the contrary intention clearly appears from the whole instrument. The Bonham Galland Trust is to continue and remain in existence so long as any fund remains to be administered in the interests of orphans and homeless Jewish children, as in the will provided. Reading paragraphs first, second, third, and fourth of the will as a whole, it seems to us clear that the testator intended that all of his estate, except the part theretofore disposed of, should constitute but one fund, devoted to but one purpose, viz.: the proposed charity, for, "If the court, however, can see an intention to make an unconditional gift to charity (and the court is very keen-sighted to discover this intention), then the gift will be regarded as immediate, not subject to any condition precedent, and therefore not within the scope of the Rule Against Perpetuities." Gray, The Rule Against Perpetuities (3d ed.), § 607.

The question, then, to be determined is whether the testator's gift in this case was an unconditional gift to charity which vested immediately in the charity to be benefited, and is, therefore, without the scope of the rule against perpetuities.

"The rule only requires that interests shall vest within certain limits. A future interest is vested if it is ready to turn into a present estate of enjoyment whenever the preceding estates determine. *A fortiori* interests which are being presently enjoyed are vested. No present interests are therefore within the scope of the rule." 30 Cyc. 1471.

"The rule does not require that future interests should become present estates of enjoyment within the limits. It is satisfied if the future interests must vest within the limits. Consequently, if an interest is vested at its creation, it is not subject to the rule at all; this is true, even though such interest may not become a present estate of enjoyment until long beyond the limits of the rule." 30 Cyc. 1482.

The industry of counsel has brought to the attention of the court many authorities treating upon this subject, only a few of which it will be necessary to notice.

In *Seaver v. Fitzgerald,* 141 Mass. 401, 6 N. E. 73, the testator by his will provided:

"Item 12th. I give, bequeath, and devise all the remainder of my property, real, personal, and mixed, of which I shall die seised and possessed, or to which I shall be entitled to at the time of my decease, to my said executors, Patrick Sweeney and Thomas Conway, to hold in trust, to use so much of the income thereof as shall be needed to give my daughter, Annie J. Rafferty, a good and suitable support so long as she shall live; also if she shall ever have a child or children, my said executors shall support them in a proper manner from said income or property during the life of each and all; the balance of said income and the property after the death of my said child, and her child or children (if any), shall all be paid over by my said executors, for the sole use and benefit of the Augustinian Society of Lawrence, a body corporate duly established by the laws of this Commonwealth, in the year of our Lord eighteen hundred and seventy, to said corporation forever."

And the court said:

"In all the cases cited by the demandant's counsel, the gift over was to persons who might not be ascertainable with certainty within the allowed time. But the present case is not of that class. There was no contingency or uncertainty as to who should finally take. The estate or interest vested in the Augustinian Society, a body corporate, absolutely and at once, upon the testator's death, subject to the preceding life estates. All that is required by the rules against perpetuities is that the estate or interest shall vest within the prescribed period. The right of possession may be postponed longer."

In *Philadelphia v. Heirs of Stephen Girard,* 45 Pa. St. 9, 84 Am. Dec. 470, § 20 of the will constituting a trust is set up in full in the statement of the case, and presents conditions very similar to those in the case at bar. The court says:

"It is a devise of all the residue of his real and personal estate to the city of Philadelphia, an existing corporation, in trust, as his 'primary object' to construct, furnish, constitute, and maintain the institution now known as the Girard College, and then for certain municipal purposes, not necessary to be now specified. It is therefore a present gift for a present and lawful purpose, and consequently a vested and executed trust for that purpose."

Further on the court says:

"The law allows the vesting of an estate or interest, or the power of alienation, to be postponed, and the accumulation of its increase to be made previous to vesting, for the period of lives in being, and twenty-one years and nine months thereafter, and all restraints upon the vesting, that may suspend it beyond that period, are treated as perpetual restraints, and therefore as void, and consequently the estates or interests dependent on them are void; and nothing is denounced by the law as a perpetuity that does not transgress this rule. And equity follows this rule by

way of analogy, in dealing with executory trusts, and those trusts which transgress the rule it calls transgressive trusts, being in equity the substantial equivalent of what in law are called perpetuities: Fearne on Rem. 538, n.; 6 Cruise 466, 478; 4 Ves. Jr. 312, 337, 341; 9 Id. 132, 134; 2 Ves. & B. 61; 2 Swanst. 428; 2 Mylne & K. 654; Lewis on Perp. ch. 12.

"This is, in fact, the rule that is appealed to for setting aside this trust, and yet, rightly understood, it really sets aside all the arguments that were made against the validity of the trust, by showing that whatever restraints are put upon the alienation of the property, they do not transgress the rule, because they have no relation to the vesting of the estate or interest."

In *Duggan v. Slocum,* 92 Fed. 806, the testator left all of the residue of his estate in trust for the following purposes: One-half to be used for the purpose of establishing and maintaining a library and reading room in connection with St. Patrick's parish, and one-half for the purpose of establishing and maintaining a Roman Catholic protectory for boys; "it being my will that the personal estate and the rents accruing from any real estate of which I may die possessed be invested in safe securities for a term of ten years or more, at the discretion of my said executors." The court says:

"We shall only look at the vital questions arising under the fourth clause of the will, which are whether its provisions are void either because the beneficial enjoyment of the charities may be postponed for a period which is styled 'remoteness,' or because the objects of the charities and the beneficiaries are too indefinitely stated. By the residuary clause an immediate and unconditional gift of the estate is made to trustees, to be used by them in the establishment and maintenance of two distinct charities. Their title is burdened with no conditions. They are not to hold it until some other person appears, who may wish to establish these charities, or until a corporation is

formed, or until a certain amount of money is contributed, but the gift is absolute, and they can have the permanent control of the charities, subject to the provision that the income is to accumulate for at least 10 years, 'or more', at their discretion. This discretionary provision in regard to accumulation makes the gift obnoxious to criticism in the mind of the complainants. 'A perpetuity is a limitation of property which renders it inalienable beyond the period allowed by law. That period is a life or lives in being and twenty-one years more, with a fraction of a year added for the time of gestation in cases of posthumous birth.' *Ould v. Washington Hospital,* 95 U. S. 303. A secondary meaning is 'an interest which will not vest till a remote period' (Gray, Perp. § 140); and the complainants assert that the beneficial interest in this fund may not be enjoyed by the people of Waterbury, or the boys of the diocese of Hartford, for a remote period, if the trustees should neglect or decline to establish the charities; and that, therefore, the entire gift is void. It is true that the time before a gift can take beneficial effect may be so remote as to avoid the gift. 'There may be such an interval of time possible between the gift and the consummation of the use as will be fatal to the former. The rule of perpetuity applies to trust as well as to legal estates.' *Ould v. Hospital, supra.* The validity of this class of bequests depends upon the law of the state of the testator; but the law of Connecticut, as will hereafter be seen, is that of England and of the states of this country generally, except where special statutes have created a peculiar system, and by this general law 'trusts for public charitable purposes are upheld under circumstances under which private trusts would fail.' *Russell v. Allen,* 107 U. S. 163, 2 Sup. Ct. 327; *Woodruff v. Marsh,* 63 Conn. 125, 20 Atl. 846. Charities are favored; the 'stern rule against perpetuities is relaxed for their benefit'; and where the gift is made directly in trust for a charity, although the beneficial effect of the gift may be postponed for a longer period than the strict rule against perpetuities permits, provided there is no gift meanwhile to or for the benefit

of a private corporation or person, courts of equity will declare the gift valid, if they can see a reasonable prospect of the consummation of the charitable purpose."

In *Russell v. Allen,* 107 U. S. 163, speaking of trusts for charitable purposes, the court says:

"Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed. They may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead."

In *Odell v. Odell,* 10 Allen (Mass.) 1, the court had under consideration a bequest of $100 annually for the period of fifty years, to be safely invested by the trustees, the interest to be added to the principal semi-annually, and at the expiration of fifty years the sum accumulated to be appropriated by a society of ladies from various religious organizations, to provide and sustain a home for respectable, destitute, aged, native-born American men and women. The court, after reviewing the authorities at length, says:

"In this state of the authorities, and in the absence of any legislation upon the subject, we are not prepared to say that accumulation for a charitable purpose can in no case be allowed for a fixed period of

more than twenty-one years, or for a contingent period beyond a life or lives in being and twenty-one years afterward."

And again:

"It was contended for the heirs at law that no title, legal or equitable, would vest in the charity until the expiration of the fifty years. But we think such is not the true construction of the will. The clause relied on is as follows: 'At the expiration of fifty years the sum which shall have accumulated shall be appropriated by a society of ladies from all the Protestant religious societies in Salem to provide and sustain a home for respectable destitute aged native-born American men and women.' Here are no words of transfer of title, and the ladies mentioned are not a corporation capable of taking the legal estate. The more reasonable interpretation is that the testator intended to continue the title of the fund in the hands of the trustees to whom he gave it in the first instance, . . ."

Hence it was held that the trust had vested.

In *Franklin v. Hastings,* 253 Ill. 46, 97 N. E. 265, Ann. Cas. 1913a 135, the court had under consideration a similar trust, with conditions which were thought to bring it within the rule against perpetuities. The court says:

"The language of the bequest here is a plain direction to the executor to hold and apply $10,000 for the purpose of aiding in the establishment and support of a public library in Lexington, and if the clause had stopped there, perhaps no question would have arisen in regard to the gift. The intention to give to the library is sufficiently manifested, but it is claimed that the subsequent provisions attach conditions to the gift which are precedent to its taking effect, and violate the rule against perpetuities. These, however, refer only to the time and manner of the enjoyment of the gift. The testatrix might have appointed trustees to carry her wishes into effect and provided for their succession in office, but she preferred a corporation author-

ized by law. She required the name of Smith to be used as a part of the name of the library and the provision of a fund, the minimum of which she did not fix, though she stated it need not exceed $5,000. These conditions would, no doubt, in a bequest to an individual be regarded as conditions precedent to the vesting of the equitable interest and obnoxious to the rule against perpetuities. Not so in a bequest to charity. The statute of Elizabeth in regard to charitable uses (43 Eliz. ch. 4) is in force in this state, and its effect is to exclude conveyances and devises to such uses from the operation of the rule against perpetuities. *Heuser v. Harris, supra* [42 Ill. 425]; *Crerar v. Williams,* 145 Ill. 625. Though a private trust cannot be created in perpetuity, that rule has no application to a gift for charitable uses.

"It is insisted, however, that there is no direct gift, but only an authority to the executor to pay and convey to the proposed library association when the conditions as to incorporation and the provision of a fund have been complied with; and that where the gift itself is thus conditional, it is subject to the same rules and principles as any other estate, and if in violation of the rule against perpetuities must fail. This is not a correct view of the gift. Neither the organization of the corporation nor the provision of a fund is a condition precedent to the vesting of the gift. The gift itself is not conditional, but is an absolute and immediate devotion of the sum of $10,000 to the purposes of the will in connection with the library."

In *Brigham v. Peter Bent Brigham Hospital,* 134 Fed. 513, where a somewhat similar provision in the will was under consideration, the court says:

"Therefore we have here a perfect trust for the founding of a hospital for the care of the sick, to be effectuated by a conveyance to a proper corporation to be organized as the will provides. This, when made, accomplishes the trust. Thus, the general purpose of the testator was continuous from his death. Therefore there is no practical difficulty in the way of holding that the trust vested at the death of the testator."

Perhaps the most nearly parallel case which has been brought to our attention is that of *Ingraham v. Ingraham,* 169 Ill. 432, 48 N. E. 561, in which case the language used by the testator is:

"I give, devise and bequeath all the rest, residue, and remainder of my estate, in whatsoever the same may consist and wherever situate, to my executors and trustees hereinafter named, in trust for the uses and purposes as follows: Said trustees shall retain said fund in their hands, and manage, control and invest the same until it shall have sufficiently accumulated for the purpose, paying therefrom the expenses of managing the trusts hereby created and the provision for my wife's household and personal expenses, as provided in the twelfth clause hereof, and then shall cause the same to be used for the erection and maintenance of a hospital for the treatment of the sick and diseased, to be located in the city of Chicago."

Then follow provisions with reference to the selection of the location, etc., and:

"It is my desire that the fund hereby created shall at least equal one hundred thousand dollars ($100,000) before any of it shall be expended for the purpose of the hospital in this clause of my will mentioned."

The court says, after discussing the authorities at length:

"In the case at bar the testator directs, in the fourteenth paragraph of his will, that the trustees shall retain the fund in their hands, and manage, control, and invest it, until it shall have sufficiently accumulated for the purpose, subject to the expenses of the trust and the household and personal expenses of his wife, and then shall cause the same to be used for the erection and maintenance of a hospital for the treatment of the sick and diseased, to be located in the city of Chicago. In a subsequent sentence of the same paragraph, the testator states it to be his desire that the fund thereby created shall at least equal $100,000 before any of it shall be expended for the purpose of

the hospital in that clause or paragraph mentioned. Counsel for appellant say, that by these provisions the time when the accumulation of the fund reaches $100,000 is fixed as the time when the charitable estate is to vest, and that thereby a remote condition precedent is imposed upon the operation of the charitable trust. A gift of personal estate at a specified future time or upon the happening of a certain contingency will not vest until the time specified has arrived or until the contingency has happened. (*McCartney v. Osburn,* 118 Ill. 403). Applying this rule, counsel reach the conclusion that, in the present case, no gift is made to the object to be benefited, aside from the direction of the trustees to pay over or use the property in question for the beneficiary, and that therefore the present gift to charity is not a present, immediate and vested estate. But it is well settled that, where a gift is general, and there is simply a direction that it be paid or applied at a specified time or upon the happening of a certain contingency, it will vest at the testator's death, and the payment or application only will be postponed. (*Scofield v. Olcott,* 120 Ill. 362; *McCartney v. Osburn, supra.*) In determining whether the gift is immediate, or is to be postponed until the time of payment or application arrives, the language of the testator will be liberally construed in favor of a vested interest, and all the language of the will, as well as that supposed to embody the direction to pay at a certain future time, will be considered in arriving at a proper construction. As has already been stated, a court will be 'keen-sighted' to discover an intention to make an unconditional and immediate gift to a charity. 'The tendency of the courts being to construe limitations as vested, the arrival of the period fixed for or needed for the accumulation will not be deemed a condition precedent to the gift of the accumulated fund, unless the language employed requires such a construction.' (Gray, on Rule Against Perp. sec. 673). Where two modes of construction are possible, by one of which a legacy or devise to charity would be made an illegal perpetuity, and by the other of which such a legacy or devise would be valid and operative, the

latter mode of construction will be adopted. (*Ibid.*, sec. 633; *Woodruff v. Marsh*, 63 Conn. 125.)

"An application of these principles to the interpretation of clause 14 leads us to the conclusion, that there was here an immediate gift to charity at the death of the testator, from which date the will speaks."

Having in mind that the court should be very keen-sighted to discover an intention on the part of the testator to make an unconditional gift to charity, and giving to the language used by the testator its natural and plain meaning, we are impelled to hold that the testator, by his will, established a trust fund to be known as the Bonham Galland Trust, which fund vested immediately upon the death of the testator, in and for the charitable uses designated by him in his will, and having so vested, the rule against perpetuities does not apply. It makes no difference how many successive trustees may be provided for to administer such fund, or that different trustees may have different duties. The trust is one and indivisible, and vested upon the death of the testator.

The judgment of the court below was right and must be affirmed.

MAIN, C. J., FULLERTON, MITCHELL, and PARKER, JJ., concur.

[No. 14760. Department Two. July 9, 1918.]

RALPH S. VALENTINE, *as R. S. Valentine & Company, Appellant,* v. NEBRASKA BRIDGE SUPPLY & LUMBER COMPANY, *Respondent.*[1]

SALES—CONTRACT—WARRANTY—CONSTRUCTION—DAMAGES. A contract for the sale of lumber providing that "it is understood" that no lumber should be below a specified grade, constitutes a warranty of quality, entitling the purchaser to damages for delivery of inferior quality.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered January 12, 1918, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Grant A. Dentler, for appellant.

Hayden, Langhorne & Metzger, for respondent.

MOUNT, J.—This action was brought to recover an alleged balance of $130.36 from the defendant for three cars of lumber sold and delivered to defendant upon a written contract. The complaint alleged a modification of the written contract before delivery of the lumber. The defendant, after denying the modification of the written contract, alleged a counterclaim of $244.59. The case was tried to the court without a jury, and resulted in a judgment in favor of the defendant for $114.23. Plaintiff appeals from that judgment.

The principal facts are as follows: On April 17, 1917, the appellant, by a written order, agreed to ship to W. D. Moreland, Minnesota Transfer, Minnesota, a certain amount of white pine lumber, "1x4 and wider, No. 2 common and better, surfaced two sides to 7/8, at $20; and 2x6 and wider, No. 2 common and better,

[1]Reported in 173 Pac. 746.

surfaced two sides, 1-⅞, at $17." The contract provided as follows:

"It is understood that this stock will be graded strictly in accordance with the White Pine grading rules and that no lumber below the grade of No. 2 common shall be loaded."

In order to fill this contract, the appellant purchased the lumber from the Dempsey Lumber Company in the rough, expecting to be able to have the lumber surfaced at $2 per thousand. When the appellant was not able to get the lumber surfaced at $2 per thousand, after some discussion the respondent agreed to procure the surfacing of the lumber, and that $2 per thousand should be deducted from the contract price. The lumber was thereupon loaded by the appellant upon cars and shipped to certain mills for dressing. After the lumber was dressed, it was reloaded on the cars and shipped to Brooks Brothers at Minnesota Transfer, where it was delivered and graded. After it was graded it was found that a part of the lumber did not come up to grade, as stated in the contract, "No. 2 common and better," and deductions were made on that account amounting to $244.59. The respondent was notified of these deductions because the lumber did not come up to grade of No. 2 common and better, and thereafter notified the appellant. The appellant thereupon claimed that the lumber was to be graded in the rough and not as dressed lumber. This action resulted.

Upon the trial, the court found that the only modification of the written contract was

"that the defendant should procure the surfacing of said lumber for and on behalf of the plaintiff and should be allowed a credit on the purchase price of $2 per thousand to apply on the cost of surfacing. That otherwise the aforesaid written contract of April 17 was to remain in full force and effect."

While the appellant argues a number of points, we think there are but two controlling questions in the case: First, whether the contract was modified so that the lumber was sold to the respondent as rough lumber and to be graded as such; second, whether the provision in the contract to the effect:

"It is understood that this stock will be graded strictly in accordance with the White Pine grading rules and that no lumber below the grade of No. 2 common shall be loaded,"

was, in effect, a warranty of the quality of the lumber.

Upon the first question, there was a direct conflict in the evidence. The written contract required the lumber to be surfaced two sides. The appellant contends that the evidence shows that the contract was modified so that the lumber was to be delivered in the rough and graded as rough lumber. It is conceded that No. 2 common rough lumber will not grade No. 2 dressed lumber. The respondent, on the other hand, contends that the contract was not modified with respect to the grade of the lumber as dressed lumber; that all it agreed to do was to have the lumber dressed and pay the difference between $2 and the actual cost of the dressing, which was $2.50 per thousand. The court, after seeing the witnesses and hearing the evidence upon this question, concluded, and we think rightly, that there was no modification of the contract with reference to the grade of the lumber as dressed lumber.

Upon the second question, it is contended by the appellant that the word "understood," as used in the written contract, is equivalent to the word "agreed," and that an agreement that "no lumber below the grade of No. 2 common shall be loaded" was not a warranty of the quality of the lumber. Whether the word "understood" in the written contract is to be

construed as "agreed" makes no difference. It was agreed that no lumber below the grade of No. 2 should be loaded. It seems to us this was a warranty of the quality of the lumber. In the case of *Fink v. Marr*, 81 Wash. 92, 142 Pac. 482, it was conceded that the phrase "to be No. 1 stock with culls thrown out," in a contract for the sale of apples, constituted a warranty of the quality of the apples; and in the case of *Peterson v. Denny-Renton Clay & Coal Co.*, 89 Wash. 141, 154 Pac. 123, where there was a contract for the sale of highway paving brick, we held that the words "highway paving brick" meant that it was necessary to furnish that character of brick, and were, in substance, a warranty of the quality of the brick; and where a warranty of that kind is made, it follows that the purchaser may recover damages for the failure to deliver the quality of the article agreed to be furnished. In that case we said:

"It would seem a travesty on justice to hold that a party could not show, in a suit to recover the purchase price, that the article delivered was not the article contracted for, but one of inferior quality and less value. It would be taking away a defense of litigants that has never been questioned by the courts. The authorities are united in holding that a vendee, when sued for the purchase price of goods, may show that the goods were not what he contracted for. . . .

"The right of a vendee, when sued for the purchase price of goods, to show that the goods received were not as contracted for is well established; *Tacoma Coal Co. v. Bradley*, and *Dickinson Fire & Pressed Brick Co. v. Crowe & Co., supra.*"

See, also, *Fink v. Marr, supra.*

We are of the opinion, therefore, that the trial court properly held that this provision in the contract was, in substance, a warranty, and that the respondent was

entitled to offset the damages against the balance due on the purchase price.

The judgment is therefore affirmed.

MAIN, C. J., HOLCOMB, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14315. *En Banc.* July 10, 1918.]

O. KITTILSBY, *Appellant,* v. SVERRE VEVELSTAD *et al., Respondents.*[1]

MINES AND MINERALS—PARTNERSHIPS—FRAUD—ACCOUNTING. Where an equal partner in a mining claim promised to do the assessment work and his copartner relied thereon, and he defaulted and secretly obtained title for himself by having another file on the same and adjoining claims, he held all the claims in trust for his copartner, and upon a sale must account for a half interest in the proceeds.

Cross-appeals from a judgment of the superior court for King county, Tallman, J., entered March 21, 1917, upon findings in part favorable to the plaintiff, in an action to recover partnership funds, tried to the court. Reversed on plaintiff's appeal.

Robert A. Devers, for appellant.

Lyons & Orton, for respondent Vevelstad.

Ballinger & Hutson, for respondent Morris.

HOLCOMB, J.—In 1911, plaintiff and one Vevelstad, while prospecting, discovered a mining claim known as the Sea Level claim, in Sitka Mining District, Alaska. Vevelstad not being a citizen, plaintiff located and filed on it for their mutual benefit. They did the assessment work for 1912; plaintiff did it for 1913; Vevelstad promised that he would have it done for 1914, and plaintiff, relying on this promise, went to Seattle. The work for 1914 was not done as promised, and the claim

[1]Reported in 173 Pac. 744.

became open to location again in January, 1915. Vevelstad procured one Singleton, who was merely to act for him and wholly for his benefit, to locate a claim covering practically the same claim as one of original discovery. On August 30, 1915, Singleton conveyed the legal title to Vevelstad for a nominal consideration. Plaintiff, believing that the 1914 assessment work had been done as promised, had no knowledge of these acts. On August 27, 1915, Vevelstad and one Fleming located three other claims adjoining the one located by Singleton. Vevelstad's one-half interest in these claims and the one procured through Singleton were, by Fleming's option agreement, on November 17, 1915, sold to the Juneau Sea Level Copper Mines for $10,000, to be paid to Vevelstad, of which $5,000 was paid before the commencement of this action, and $5,000 deposited in court. On December 5, 1916, this action was commenced, and thereafter, before trial, the claims were sold by the Juneau Sea Level Copper Mines to C. L. Morris, who has been substituted for it as a defendant. Plaintiff seeks recovery of the sum of $5,000, being one-half of the purchase price of the claims sold by Vevelstad. The trial court awarded plaintiff $500, and in effect quieted title to the mining claims in C. L. Morris. Plaintiff, Vevelstad, and Morris have appealed. This is not a suit involving the title to the relocated claims, and Morris' appeal will, therefore, not be considered.

Plaintiff contends that the trial court erred in refusing to award him a judgment in a larger amount, while Vevelstad contends that the court erred in awarding plaintiff a judgment.

The evidence as to the 1914 assessment work and Vevelstad's promise to plaintiff to do it for that year is conflicting; but we are convinced that such promise was made, and under such circumstances as to lead

plaintiff to rely thereon. There is conflicting evidence that the Sea Level claim was unsalable without the other three claims, but to the same extent there is evidence that the three additional claims are worthless without the Sea Level claim. Be that as it may, plaintiff and Vevelstad were mining partners; therefore, whatever additional interest Vevelstad obtained was for the benefit of the partnership, unless we should hold that the acts of Vevelstad dissolved the partnership for all purposes. It is manifest that the location of the new claim by Singleton at the request of Vevelstad was for the purpose of defrauding plaintiff out of any interest in it he might claim. Plaintiff and Vevelstad were partners in a joint venture of prospecting and locating mines. Vevelstad knew that, if the assessment work for 1914 was not performed, the claim would be open for location. His failing to do the work as promised, and his secret method of obtaining the claim through the instance of Singleton, cannot be sanctioned. Good faith would require him to notify his partner that the assessment work as promised by him would not be performed. Whether the original location was forfeitable by the government in 1915 is immaterial, for, as between the parties, the forfeiture condition was created by the fraud of Vevelstad. Story, Partnership (7th ed.), § 172, states the rule concerning the relation of partners to each other as follows:

"Good faith not only requires that every partner should not make any false representation to his partners, but also that he should abstain from all concealments which may be injurious to the partnership business. If, therefore, any partner is guilty of any such concealment, and derives a private benefit therefrom, he will be compelled in equity to account therefor to the partnership."

"There is no stronger fiduciary relation known to the law than that of a copartnership, where one man's property and property rights are subject to a large extent to the control and administration of another." *Salhinger v. Salhinger,* 56 Wash. 134, 105 Pac. 236.

Parsons, Partnership (4th ed.), § 158, and note 2, lays down the rule as follows:

"If fiduciary relation means anything, I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on. These properties of partnership render it eminently a relation of trust. All its effects are held in trust, and each partner is, in one sense, a trustee; a trustee for the newly created entity, the partnership, and for each member of the firm, who thus becomes a beneficiary under the trust."

These principles are sustained and applied by this court in *Finn v. Young,* 46 Wash. 74, 89 Pac. 400; *Id.,* 50 Wash. 543, 97 Pac. 741; *Causten v. Barnette,* 49 Wash. 659, 96 Pac. 225; *Salhinger v. Salhinger, supra,* and *Galbraith v. Devlin,* 85 Wash. 482, 148 Pac. 589.

The requirement of the utmost good faith forbids that a partner benefit his private interest by deceiving his copartner by misrepresentations or concealments of the confidential relation. This is a suit for the proceeds of the sale of the partnership property; in other words, for a division of the partnership funds, and not for a division of the mining claims. Equity requires, therefore, that Vevelstad pay to the plaintiff one-half of the $10,000, or $5,000, with costs. Appellant Morris will not be disturbed in his title, but he will recover no costs.

Reversed, with instructions to enter judgment in conformity herewith.

MAIN, C. J., CHADWICK, FULLERTON, MOUNT, TOLMAN, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 14631. Department One. July 10, 1918.]

ELECTRIC SALES CORPORATION, *Appellant*, v. COLIN O. RADFORD *et al.*, *Respondents*.[1]

COMPROMISE AND SETTLEMENT—EVIDENCE—SUFFICIENCY. The evidence sustains findings that a compromise and settlement was not binding where the written memorandum shows a misunderstanding and it appears that material misrepresentations were made and relied upon when the compromise was under discussion.

DAMAGES — MEASURE OF DAMAGES — BREACH OF CONTRACT. The measure of damages for breach of a contract to install heating appliances in houses is the actual outlay of the owners made necessary by the failure of the heating system, which was inadequate for the purpose designed, rather than the depreciation in the value of the real property on account of the misrepresentations.

Appeal from a judgment of the superior court for King county, Jurey, J., entered June 19, 1917, in favor of the defendants, in consolidated actions to foreclose mechanics' liens, tried to the court. Affirmed.

E. L. Skeel (*Roberts, Wilson & Skeel*, of counsel), for appellant.

Peterson & Macbride, for respondents.

FULLERTON, J.—The appellant instituted several actions for the foreclosure of mechanics' liens for the balances due on the installation of electric heating systems in seven different houses owned by the respondents Radford, setting up items aggregating $963.20. These actions were consolidated for purposes of trial.

[1]Reported in 173 Pac. 942.

An affirmative defense was interposed by the respondents in which they averred that, in reliance on the representations of appellant that its electric system would adequately heat the houses at a cost not to exceed ten per cent more than the ordinary coal furnace, they contracted with the appellant for the installation of its electric heating system; that such system was impractical and inadequate and the cost of operating prohibitive; that the apparatus was so defective that it leaked oil, causing damage to the woodwork and furnishings of the houses; that the respondents removed, or caused to be removed, such heating apparatus from all except two of the houses; that the respondents were compelled to replace such apparatus with coal burning furnaces; that they had paid out for wiring necessary for such system the sum of $230; for electric current for its operation, $221.53; for expense of installation on which they are entitled to refunds in the sum of $1,408.40; and that they have suffered general damage, in virtue of the facts set forth, in the sum of $5,000. By way of affirmative reply, the appellant alleged that, on March 16, 1916, it was agreed between the parties that, if appellant would remove the radiators and auto time clocks from four of the dwellings and credit respondents with the sum charged therefor, the respondents would pay the entire balance of the account in full satisfaction and settlement of all claims by either against the other.

On these issues, the cause was tried before the court, who found that there was due from the respondents to the appellant on the various causes of action sums aggregating $878.02, against which the respondents Radford were entitled to credits and damages under their counterclaim in the sum of $882.28; that the claims of each balanced and offset the claims of the other, and that neither party should recover costs. On

such findings the court decreed that the appellant take nothing against the respondents; that the respondents Radford take nothing in virtue of their counterclaims; that each of the liens filed by appellant be canceled and annulled, and the title of respondents Radford and their grantees in each of the properties involved be quieted as against any claim of the appellant.

It is first contended by the appellant that the court erred in failing to give effect to the alleged compromise agreement. It is claimed that, under the agreement, the appellant is entitled to payment in full of its claims against all the houses, with the exception of deductions allowed on the price charged for radiators and auto clocks to be withdrawn from four of the houses, which would leave a balance in appellant's favor of $759.63 after the allowance of all deductions to which the respondents were entitled. But a reading of the evidence convinces us there was not such a meeting of minds concerning it as would make a binding agreement. The written memorandum of the parties, made shortly after the meeting at which the compromise was broached, shows a misunderstanding; and, whether intentionally or not, representations were made by an officer of the appellant concerning the efficiency of the apparatus in certain of the houses which afterwards proved unfounded, the result being that the respondents had to remove the heaters from these houses and install others of a different character. This caused a loss not contemplated when the compromise was under discussion, and we think the court rightly decided the agreement not obligatory.

Respecting the contention as to the insufficiency of the evidence to sustain the court's findings in the matter of offsets to which respondents were entitled by reason of the necessary outlays and damages suffered

by them, we think the evidence shown in the record amply warrants the holding of the trial court.

The appellant further contends that the only measure of damages for breach of a contract to install heating appliances as represented would be the difference between the value of the real property with the defective installation and its value if the appliances had been as represented. The sum allowed by the court was the actual outlay of the respondents made necessary by the failure of the heating system, which had been installed on the representations of the appellant that it was entirely adequate for the purpose designed. We think, under the facts in the case, the rule followed by the court more nearly meets the ends of justice.

The judgment is affirmed.

MAIN, C. J., PARKER, MITCHELL, and TOLMAN, JJ., concur.

[No. 14698. Department Two. July 10, 1918.]

CARL MURRAY, *Respondent*, v. STAR PAINT & WALL PAPER COMPANY, *Appellant*.[1]

APPEAL—REVIEW—DISCRETION—NEW TRIAL. The granting of a new trial will not be disturbed on appeal except for abuse of discretion.

Appeal from an order of the superior court for King county, Ronald, J., entered November 5, 1917, granting a new trial, after the verdict of a jury rendered in favor of the defendant, in an action in tort. Affirmed.

Cassius E. Gates, for appellant.

Myers & Johnstone, for respondent.

[1]Reported in 173 Pac. 721.

PER CURIAM.—In this action respondent seeks recovery for personal injuries sustained by him in an automobile collision in Seattle. The case was tried before a jury, which found for defendant. This is an appeal from the order of the court granting respondent a new trial. The lower court is vested with discretion to grant or deny a motion for new trial, and when that judgment is so entered, it will not be disturbed on appeal unless it is shown that there was a manifest abuse of such discretion. *Hawn v. Yakima County,* 93 Wash. 87, 160 Pac. 7.

The record presenting no such abuse, the judgment is affirmed.

[No. 14715. Department One. July 10, 1918.]

D. O. PRATT, *Receiver etc., Respondent,* v. SCANDINAVIAN-AMERICAN BANK OF SEATTLE *et al., Appellants.*[1]

SALES — CONDITIONAL SALES—AFTER-ACQUIRED PROPERTY—TITLE—SUBSEQUENT CREDITORS. A clause in a duly recorded conditional sales contract providing that after-acquired property of the vendee shall be added and become the property of the vendor subject to the sales contract, does not, as against subsequent creditors of the vendee, pass the title to property subsequently acquired by the vendee under another conditional sales contract, notwithstanding the last vendor lost the property by failing to record its bill of sale; since the title thereto never passed to the vendee, as against the last vendor or subsequent creditors, and the first vendor was neither a subsequent purchaser, incumbrancer or creditor, within Rem. Code, § 3670.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 11, 1917, upon findings in favor of the plaintiff, in an action in replevin, tried to the court. Affirmed.

[1]Reported in 174 Pac. 462.

Ballinger, Battle, Hulbert & Shorts, for appellants.
Baxter & Jones, for respondent.

MITCHELL, J.—In this cause there is no dispute as to the facts, which are substantially as follows: In July, 1916, J. F. Lane, as trustee of the Scandinavian-American Bank, entered into a conditional sale contract with A. R. Badgley, whereby he agreed to sell to Badgley, who agreed to buy, a sawmill and logging outfit. The purchase price, bearing interest at six per cent per annum, was to be paid monthly at the rate of $1 per M on all lumber cut, monthly payments to be not less than $208.33. The contract covered real estate and all the personal property making up the sawmill and logging outfit. It provides that the title to all the property shall remain in Lane, trustee, until the purchase price is fully paid, and in the event of failure to make payments as agreed, Lane, as trustee, may retake possession of the plant and property and terminate and discharge the contract. It has this further provision, viz.:

"Any additions by way of machinery, equipment, or of any kind or character, to the said property or plant made by second party during the term of this agreement shall become and be the property of first party, subject to the terms of this agreement.

"Title to all of the property hereinafter described, together with any and all additions or improvements to said mill plant or property, shall be and remain in first party until full and complete payment of the purchase price herein named."

Badgley executed the contract only for, and on behalf of, the B. H. M. Lumber Company, then being organized to take over the contract and all the plant and property. Shortly, the lumber company took possession of all the property and operated it until November 10, 1916, when the lumber company failed. The

conditional sale contract was duly filed for record, as required by law, within ten days after the vendee took possession of the property. While the lumber company was operating, it added to the mill outfit the personal property described in the complaint and involved in this suit. The lumber company failed to make payments as contracted, and on November 10, 1916, Lane, as trustee, retook possession of the plant and property, including that added by the lumber company, claiming such right under the terms of the Lane-Badgley contract. Respondent, Pratt, was appointed receiver of the lumber company on November 26, 1916. All the property in dispute which was added to that sold by Lane, as trustee, was purchased by the lumber company from the Contractor's Machinery & Storage Company, of Seattle, under conditional sale contracts, in August, 1916, which contracts were not filed of record as required by statute, and such vendors do not now claim any right or title to the property nor any interest in this suit. The property in dispute consists of a planer, a blower and other attachments which were never affixed to, or set up at, the mill, and a locomotive and logging trucks which were used somewhat by the lumber company in moving logs to the mill. There have been filed with the respondent, as receiver of the lumber company, allowed creditors' claims in the sum of $6,000, all of which were incurred subsequent to the purchase by, and delivery to, the lumber company of the property in suit. The only property now in the hands of the receiver is cash $15, and other personal property of about $50 in value. The value of the property in suit is $1,750. The receiver's action, in claim and delivery, resulted favorably. A new trial was denied, and Lane, as trustee, and others appeal.

The real question in the case is: Does the after-acquired title clause in the Lane-Badgley contract en-

title appellants to the property delivered to the lumber company by the Contractor's Machinery & Storage Company, awarded to respondent by the judgment? Appellants assert the affirmative.

Appellants' dominant idea seems to be that, because, as they say, the Lane-Badgley contract as to after-acquired property is binding upon the parties thereto, therefore it is binding on respondent as the representative of the creditors of the lumber company; and that the moment the lumber company purchased and received possession of the property in dispute, thus adding it to the mill plant or logging outfit, instanter and by virtue thereof the rights of appellant Lane attached to it, he becoming the owner of it, and upon the termination of the contract for failure of the lumber company to comply with its terms, and by Lane's taking possession of the property before the appointment of the receiver, that then both title and possession of the property became transferred to Lane under the positive agreement between the parties. Supplementing such contention, it is further insisted by appellants that the disputed property became that of Lane, as trustee, as fast as it was added to the plant, and especially so after Lane took possession of it for failure of respondent to comply with the terms of the original contract; and that it makes no difference whether this right was acquired by reason of a preexisting debt or not, for, under the decisions of this court, a purchaser or incumbrancer in consideration of a preexisting debt is protected by statute.

Before noticing appellants' authorities, it is advisable to bear in mind the statute involved, which is Rem. Code, § 3670, as follows:

"That all conditional sales of personal property, . . . containing a conditional right to purchase, where the property is placed in the possession of the

vendee, shall be absolute to all *bona fide* purchasers, pledgees, mortgagees, encumbrancers and subsequent creditors, whether or not such creditors have or claim a lien upon such property, unless within ten days after the taking of possession by the vendee, a memorandum of such sale, stating its terms and conditions, and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides."

Counsel for appellants treat the two propositions as so strongly allied that the cases relied on are cited without specific devotion to either proposition—a plan with which no fault is seen. The first case cited is *Lundberg v. Kitsap County Bank,* 79 Wash. 75, 139 Pac. 769, involving a contract providing that, if a dry kiln is built, it also shall be forfeited, with reference to which the court said:

"The plain intention is that the dry kiln and the rest of the property are to be classed together and all surrendered to the vendor, if the conditions of payment are not complied with."

The controversy in the case was between parties all of whose rights were controlled by contract.

The next case is *Johnston v. Wood,* 19 Wash. 441, 53 Pac. 707. Johnston, by a conditional sale contract, never recorded, sold and delivered a piano to one Likens, who in turn sold and delivered it to Wood, a purchaser in good faith, in settlement of a board bill, and the court, construing the statute, held that the term "all creditors, or purchasers in good faith" applies without restriction to all purchasers without notice, and protects one who cancels a preexisting debt for the property.

Next, in *Worley v. Metropolitan Motor Car Co.,* 72 Wash. 243, 130 Pac. 107, the question was: Is a chattel mortgage, duly recorded, subsequent in time, en-

titled to priority over an unrecorded conditional sale? The court held it was, although the mortgagee furnished the money some appreciable time before the auto was purchased.

The next two cases, *Blanchard v. Cooke,* 144 Mass. 207, 11 N. E. 83, and *Bennett v. Bailey,* 150 Mass. 257, 22 N. E. 916, are explained by a quotation from the latter, as follows:

"It was settled in *Blanchard v. Cooke,* 144 Mass. 207, after a careful review and a full consideration of the authorities, that possession of after-acquired personal property, rightfully taken and maintained by a mortgagee, under a mortgage purporting to cover it, gives him a title good not only against the mortgagor, but even against an assignee in insolvency or an attaching creditor."

In each of these cases the parties to the contract were the only ones in court, and there is no question involved as to the after-acquired property having been obtained by a conditional sale contract.

In the case of *Harding v. Lewenberg,* 174 Mass. 394, 54 N. E. 870, the court only decides that the grantee under a conditional sale contract of a stock of merchandise could not, in case of a breach of the contract, take after-acquired property because there was no provision in the contract giving such right.

In the case of *Hills v. Stimson Co.,* 102 Wash. 1, 172 Pac. 1181, the defendant was to erect a building at a certain cost and let it at a stated rental to the Natatorium Company, with the further understanding that the Natatorium Company, at its own expense, should furnish and install certain equipment, machinery and fixtures which should become a part of the building. They were placed in the building, and afterwards, on failure of the Natatorium Company and possession taken by defendant, the plaintiff, as trustee in

bankruptcy of the Natatorium Company, contended that, as the Natatorium Company had never paid the purchase price for the articles attached and affixed to the building by it, the defendant was not entitled to them as against the open creditors represented by the trustee. True, the court held with the defendant, construing only the contract between the defendant and the Natatorium Company, there being no conditional sale contract involved in the case.

Lastly, there is the case of *Keyes v. Sabin,* 101 Wash. 618, 172 Pac. 835. In this case, on March 4, 1915, Williams & Company, merchants, being indebted to certain creditors who were pressing for payment, executed to Keyes, as trustee for the use of those certain creditors, promissory notes, and attempted to secure them by a chattel mortgage on the stock of goods. The mortgage was not recorded until March 27, 1915. In the meantime, March 20, 1915, Williams & Company made a common law assignment of their property, including the stock of goods, to Sabin for the benefit of creditors. Sabin immediately took possession of the stock of goods. The assignee had no notice of the mortgage when he took possession, nor was it shown that any of the creditors of Williams & Company, other than the beneficiaries of the mortgage, had notice. The mortgagee presented to the assignee, and unsuccessfully prosecuted, his claim as preferred. The court held the mortgage void as to general creditors. There is no question of conditional sale contract in the case.

If we keep in mind what we are about, it will be seen that appellants are afield. This is not a controversy between the parties to the Lane-Badgley contract, but one between Lane, as trustee, and the creditors of the other party to that contract, now represented by the receiver, and between whom there is no contractual re-

lation. Appellants base their rights upon a contract made while there existed a statute the protection of which is invoked by the other parties to the action.

The essential and original error of appellants is they assume the very thing in dispute, namely, that, because of the after-acquired title clause in their contract, the subsequent acquisition by the lumber company of the property in dispute, and the breach of the contract for failure to make payments, therefore the *title* to the disputed property becomes vested in or transferred to appellants. We speak lightly when we say the lumber company purchased the property from the Contractor's Machinery & Storage Company, if by that is meant that the title passed. It would be inconsistent with the very meaning of *conditional* sale, which reserves title in the vendor until the agreed purchase price is paid; and, as aptly contended by respondent, the lumber company never acquired *title,* either by reason of the vendor's failure to file the conditional sale contracts or otherwise, and that, as between the vendor and vendee, the contract remained enforceable, and the vendor lost the property only because of the statute making the sale absolute as to the creditors. The question here is no longer an open one in this state. In the case of *Peterson v. Chess,* 92 Wash. 682, 159 Pac. 894, we said:

"We have consistently held that one who takes property under a conditional bill of sale is not an owner and has no element of title; that title passes only upon full performance of the conditions precedent to which he has subscribed. *Winton Motor Carriage Co. v. Broadway Automobile Co.,* 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71; *Duarte v. Minnick,* 85 Wash. 539, 148 Pac. 600."

The general rule as to the rights of a mortgagee, with reference to after-acquired property and the limi-

tations of the rule, finds clear exposition in the case of *Harris v. Youngstown Bridge Co.*, 90 Fed. 322, where the court says:

"It is well settled, since the decision of the supreme court of the United States in *Pennock v. Coe*, 23 How. 117, that one may execute a mortgage, valid at least in equity, upon property not in existence or not owned by him, the lien of which will immediately attach to the property when it shall come into existence, or become the property of the mortgagor; and this whether the title of the mortgagor is legal or equitable. The rule has been applied both to real and to personal property. [Citing authorities.] *The limitations of the rule are clearly drawn in the foregoing cases. The chief is that the mortgagee of after-acquired property is not a purchaser for value, and cannot acquire an interest by way of lien greater than that which the mortgagor has himself acquired.* The lien of the mortgage attaches to after-acquired property in the condition in which the mortgagor takes it from his vendor, and subject to all known liens and equities valid against the vendor, and also subject to all liens or equities valid against the vendee and mortgagor which arise in the act of purchase or acquisition, and therefore necessarily qualify its scope and extent. . . . In cases of conditional sales to the mortgagor, the mortgagee, under the after-acquired property clause, obtains a lien subject to the same defeasance or forfeiture as that to which the title of his mortgagor is subject. *Fosdick v. Schall*, 99 U. S. 235, 251; *Myer v. Car Co.*, 102 U. S. 1; *Trust Co. v. Groome*, 2 U. S. App. 95, 105, 1 C. C. A. 133, 48 Fed. 868; *Loomis v. Railroad Co.*, 17 Fed. 301, 305."

Appellants, under the after-acquired title clause of the Lane-Badgley contract, are situated in relation to the property in question just as the mortgagee in the case last mentioned was to the property involved therein. Appellants have no rights under the statute to the disputed property. They are neither purchasers nor incumbrancers, because the lumber company had no

title to the property such as is necessary to support a sale or incumbrance, it being at all times, so far as appellants and the lumber company are concerned, the property of the vendor under the conditional sale contract, and, of course, there is no contention that appellants are subsequent creditors.

There is no claim on the part of appellants, as we understand, that their taking possession of the property, *per se*, gives them any rights to it.

Judgment affirmed.

MAIN, C. J., PARKER, FULLERTON, and TOLMAN, JJ., concur.

[No. 14129. *En Banc.* July 13, 1918.]

MILDRED M. MESSICK, *Respondent*, v. NATIONAL COUNCIL OF THE KNIGHTS & LADIES OF SECURITY, *Appellant*.[1]

APPEAL—STATEMENT OF FACTS—STRIKING. A statement of facts, filed out of time without proper notice of application for extension of time, is properly struck out.

PLEADING—BILL OF PARTICULARS—COPIES IN POSSESSION OF DEFENDANT. Defendant's demand for bill of particulars furnishing a copy of by-laws and proof of death in possession of the defendant is properly refused.

INSURANCE—MUTUAL BENEFIT INSURANCE—PLEADING—COMPLAINT. In an action upon a benefit certificate, the complaint is sufficient where it alleges its issuance, that it remained in full force until the death of the insured, that plaintiff was the beneficiary and had made due proofs and demanded payment, although it did not allege full compliance with all conditions.

APPEAL—REVIEW—PLEADINGS—AMENDMENTS. After trial on the merits under a defective complaint, capable of amendment, all amendments will, on appeal, be considered as made, as required by Rem. Code, § 1752, which is a later statute and controls Id., § 263, providing that objection that the complaint fails to state a cause of action may be made at any time.

[1]Reported in 173 Pac. 940.

APPEAL—PRESUMPTIONS—PLEADINGS—DISCRETION. The denial of a motion to make a reply more definite and certain must be presumed to be without prejudice, in the absence of any showing of abuse of discretion, surprise, or anything preventing the presentation of a defense.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 29, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a benefit certificate. Affirmed.

Thos. H. Bain, for appellant.

J. Speed Smith and *Henry Elliott, Jr.,* for respondent.

FULLERTON, J.—The appellant, a fraternal benefit society, issued a benefit certificate to one Jay T. Messick for $1,000, payable upon his death to his daughter, the respondent. After the death of Messick, the appellant declined to pay upon the certificate, and this action was brought to recover thereon. On appearing in response to the complaint, the appellant demanded a bill of particulars, which was granted in part and refused in part. The appellant then filed a general demurrer to the complaint, which the trial court overruled. It then answered, putting in issue by denials certain of the traversable allegations of the complaint and setting up affirmative matter. To the answer, the respondent replied by denials and by affirmative matter in avoidance. The appellant moved that the reply be made more definite and certain, which motion the trial court overruled. The cause was then tried by the court sitting with a jury, and verdict returned for the respondent. This appeal is from a judgment entered on the verdict.

On taking the appeal, the appellant sought to bring up with the record a statement of facts. Prior to the hearing in this court on the merits, this statement was

stricken on the motion of the respondent. Subsequent thereto the appellant was permitted to review the order striking the statement by a motion to reinstate it, which, upon a hearing, was denied by the court. The appellant again asks that the question be reviewed, but we find nothing new presented justifying such a course. The statement was stricken for want of proper notice to the respondent of an application for an extension of time in which to file the statement in the trial court, and to grant the application now made would not only be to review a question twice decided, but would be to deny to the respondent rights guaranteed him by the statute.

The statement of facts being stricken, the questions open for consideration relate wholly to the rulings of the court upon the demurrer and the preliminary motions of the appellant.

The first of the preliminary proceedings of which complaint is made is the refusal of the court to require the respondent to furnish a bill of particulars to the extent demanded by the appellant. The demand was for a copy of the certificate upon which the action was based, a copy of the by-laws of the appellant society, and a copy of the proofs of death. The court required a copy of the certificate to be furnished, but denied the motion as to the by-laws and the proofs of death. In this there was no error. A party is not required to furnish by a bill of particulars facts already in the possession of his adversary, nor is he required to furnish by that means copies of instruments as accessible to his adversary as they are to him. Certainly the appellant had possession and access to its own by-laws, and the proofs of death were in its possession, as these had to be furnished as a prerequisite to the respondent's cause of action.

In her complaint the respondent set forth the issuance of the benefit certificate to her father; that it remained in full force and effect until his death; that she was named as the beneficiary therein; that, in due time and in accordance with the terms of the certificate, she had submitted proofs and made demand for the amount agreed to be paid, and that payment thereon had been refused. There was no detailed allegation of the performance of every condition of the certificate, nor general allegation of the performance of all conditions, further than such as might be implied from the allegation of its issuance and that it at all times remained in full force and effect. It is contended that, for want of one or the other of these latter allegations, the complaint is fatally defective, and that the demurrer thereto should have been sustained.

But, conceding that the allegation to the effect that the benefit certificate was in full force and effect at the time of the death of the insured is not equivalent to a general allegation that all the conditions of the certificate have been complied with, still we think the complaint sufficient. In insurance policies of this sort, provisions relative to keeping the insurance in force after the policy is once issued are conditions subsequent, wholly within the knowledge of the insurer and usually without the knowledge of the beneficiary. Under the general rule, therefore, it is matter of defense to be interposed by the insurer, it being sufficient for the beneficiary to set forth the contract and aver its breach on the part of the insurer. This complaint, we are satisfied, sufficiently does this.

Again, the complaint does not show on its face a want of a cause of action. At most there is but a defective statement of a good cause of action. The complaint is capable of amendment, and, under the statute, when a trial on the merits is had, we are admon-

ished to consider all amendments as made which could have been made. (Rem. Code, § 1752.) So here, in the absence of a statement of facts, we must presume that the case was tried as if upon a sufficient complaint, and that the evidence was sufficient to justify a recovery. It is true the statute provides (Rem. Code, § 263) that the objection that the complaint does not state facts sufficient to constitute a cause of action may be made at any stage of the proceedings either in the superior or supreme court, but this statute must be read in the light of the statute above referred to, which is later in time and which modifies it to the extent in which there is a conflict.

The reply, in answer to the affirmative defense of a breach of condition to pay dues, set forth an agreement to carry the policy on notice of the insured's inability to pay because of illness. The motion against the reply was directed to this allegation, its purpose being to require the pleader to set forth the name and character of the officer of appellant to whom the notice of the insured's illness was given, and with what officer or person the alleged agreement was made. While the motion might well have been granted, the matter rested largely in the discretion of the trial court, and from the record before us, that is, from the pleadings, motion and the ruling thereon, we are unable to say that the discretion was abused. In other words, the order, being discretionary, does not on its face show prejudice; it does not show that the appellant was taken by surprise, or that it was in any manner prevented thereby from presenting its defense. In the absence of such a showing, we must presume in aid of the judgment that no prejudice existed.

The appellant cites the by-laws of its organization to the effect that no subordinate lodge of the order has power to waive the payment of dues, and argues there-

from that no defense was stated by this particular allegation. But the allegation is not that the subordinate lodge waived the payment, but is that the appellant itself made the agreement and waiver. Nothing is shown to indicate that the appellant itself did not have such power, and no presumption arises to the contrary.

The judgment is affirmed.

MAIN, C. J., PARKER, MITCHELL, MOUNT, TOLMAN, MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 14575. Department One. July 16, 1918.]

SAM SIMON *et al.*, *Appellants*, v. SAXONY KNITTING COMPANY, *Respondent*.[1]

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will be reversed where the evidence preponderates against them.

SALES—EVIDENCE—SUFFICIENCY. Upon conflicting evidence as to a conversation resulting in a sale of merchandise, the testimony of a witness that the sale was made to the defendant is sufficiently corroborated by testimony that, on objecting to sell to another for want of credit, it was agreed to charge the goods to defendant as an accommodation and to secure prompt shipment, and that they were shipped accordingly.

Appeal from a judgment of the superior court for King county, Jurey, J., entered October 11, 1917, upon findings in favor of the defendant, in an action on contract, tried to the court. Reversed.

Leopold M. Stern, for appellants.
Grinstead & Laube, for respondent.

TOLMAN, J.—This action was brought by the appellants against the respondent to recover $500, alleged to be due on a sale of merchandise which they claim

[1]Reported in 173 Pac. 1022.

to have made to the respondent, the goods in question having been shipped to a third party. The total value of the shipment was $748.75, and it is admitted that $248.75 was paid on account by the party to whom the goods were shipped. Findings and judgment were entered in favor of the respondent by the trial court, and this appeal followed.

The controversy is a clean-cut issue of fact only, between reputable business houses, and no advantage can accrue to any one by giving a detailed statement of the facts, or entering into any considerable discussion of them.

The trial court seemed to be in some doubt, saying: "It is a close case, dangerously close. One man might say the burden is sustained and another one say it is not sustained." Under these circumstances, and following our familiar rule, the judgment of the trial court cannot be disturbed, unless we can find from all the proof in the case that the evidence preponderates against the judgment of the trial court. After a most painstaking examination of the whole record, we are forced to the conclusion that the evidence does so preponderate in this case.

Assuming with the trial court that the testimony of appellants' witness Davidson is offset by the testimony of respondent's witness Seeds, we yet find in the record the deposition of the witness Drake, and his testimony as to the facts, in our judgment, fully corroborates the testimony of Davidson, though the conclusions drawn from him on cross-examination are inconsistent with such facts. Mr. Drake says in answer to interrogatory 22:

"The substance of the conversation was this, that when Mr. Davidson learned that the goods were to be charged, he wanted to know the financial rating of the Natatorium Company and discovered that it hadn't

any. Mr. Berger suggested that the goods be charged to J. Berger and A. Shubach, who were, respectively, president and secretary and treasurer of the Natatorium Company and owned practically all of the stock. Davidson objected to this suggestion, preferring a credit rating; whereupon Mr. Seeds volunteered the privilege of having the goods charged to the Saxony Knitting Company as an accommodation purely to the Natatorium Company, and in order to procure prompt shipment. As a result of this arrangement, the goods were shipped that same evening or the following day."

This is as near a statement of fact as one might hope to draw from a witness by written interrogatories; and while not entirely free from the objection that it contains conclusions of the witness, it will be at once discovered that the conclusions were of fact only, as almost necessarily occurs when a witness attempts to give the substance of a conversation which occurred some time before.

The cross-examination, on the contrary, discloses that there the witness attempted to give his conclusions as to the law:

"Cross Interrogatory No. 1: Was the plaintiff's sale of merchandise referred to in the direct interrogatories made to the Natatorium Company or to the Saxony Knitting Company?"

To which was interposed the objection that the interrogatory called for a conclusion of law on the part of the witness, which objection might well have been sustained by the trial court.

"A. I would say that the Natatorium Company bought the goods and the sale was made to it."

A vitally different sort of conclusion, it will be observed, from those contained in the quoted testimony on direct examination, and one which in no way lessens the force of his direct testimony.

Nor was this the only corroboration of the witness Davidson. The letter of October 13, 1916, written by respondent's president, even after considering his explanation that his only knowledge then of the transaction was that received from Mr. Drake, carries great convincing weight, and was sufficient corroboration of Mr. Davidson and of the testimony given by Mr. Drake on direct examination to entitle the appellant to prevail.

We are forced to conclude that the evidence preponderates against the findings of the trial court, and its judgment will be reversed, and the cause remanded with directions to enter judgment in favor of the appellants and against the respondent as prayed for in the appellants' complaint.

MAIN, C. J., MITCHELL, and PARKER, JJ., concur.

[No. 14581. Department One. July 16, 1918.]

THE STATE OF WASHINGTON, *on the Relation of E. E. Beaty, Respondent,* v. GUARANTEE MANUFACTURING COMPANY *et al., Appellants.*[1]

CORPORATIONS — STOCKHOLDERS — INSPECTION OF BOOKS. A trade competitor of a corporation cannot, by acquiring a small amount of dormant stock, demand an inspection of the corporate books, minutes, and trade secrets, in the absence of any by-law on the subject of inspecting records; and it appearing that the demand was not in good faith and not in the best interests of the corporation, the inspection allowed will be confined to the book containing the names of the stockholders, according to Rem. Code, § 3701.

Appeal from a judgment of the superior court for King county, Smith, J., entered September 5, 1917, in favor of the plaintiff, in an action for a writ of man-

[1]Reported in 174 Pac. 459.

damus to compel the officers of a corporation to permit a stockholder to inspect corporate records, tried to the court. Modified.

J. P. Wall (*Palmer & Askren,* of counsel), for appellants.

George F. Hannan, for respondent.

MITCHELL, J.—The Guarantee Manufacturing Company, a corporation, appellant, has its office and principal place of business in Seattle, where, since April, 1912, it has been engaged in manufacturing and selling planer knives, etc., for saw machinery. E. E. Beaty, respondent, has been engaged in the same kind of business in Seattle since February, 1912. Both parties admit a state of active competition between them, one expressing it as "earnest, decided and positive." Appellants Conforth, Smith and Himes have been officers of the corporation since its organization and own all of the 100 shares of its capital stock other than eight held as treasury stock and twelve shares formerly held by one I. G. Tveton, now held by respondent. Formerly, Conforth, president of the company, and respondent were associated in business, but disagreements separated them. Appellant Smith, secretary of the company, at one time worked for respondent, but after a while litigation and ill-feeling arose between them, their business relations ceased, and, in the face of opportunity, they have not spoken to each other the last three or four years. Prior to respondent's purchase of stock, as a result of about three years of special work and experiments and the expenditure of considerable money, the corporation produced and uses a secret and valuable process for treating and finishing steel used by it in manufacturing planer knives, and, indeed, uses special and particular formulas suited to the needs of individual customers. The business of

each improved, the corporation using its profits to enlarge its business. Business rivalry, sometimes of a personal sort, kept ill-feeling alive. I. G. Tveton, from the organization of the corporation, had worked for it, owning twelve shares of the capital stock, until some dispute induced him to quit. For some time prior to quitting, Tveton's twelve shares were pledged to Conforth to secure a loan of $75, now long past due. Rather promptly, upon Tveton's leaving the company, respondent, learning that Tveton owned twelve shares of stock, purchased them for a small amount, and by and in the name of another redeemed them from the pledge to Conforth, and then, through that same other person, had the twelve shares of stock reissued to himself, respondent. Incidentally, it may be mentioned that this is respondent's first venture in the purchase of stock in an industrial concern, while his manufacturing business justifies the use of all his capital.

Within a day or so after buying the twelve shares, respondent demanded of the company an inspection of all its account books, stock books, by-laws, minutes of trustees' and stockholders' meetings, and all other corporation records, for the alleged purpose of finding out the condition of the company; that is, as he says, to find out what his stock was worth and if there were any dividends to be distributed. His demand in this respect was refused by the officers of the company, who further told him that they issued a statement about the first of each year and that he would get one at the proper time. Thereupon respondent instituted this action, alleging ownership of stock, his desire to learn the true condition and management of the business and the value of the stock, to which end he had unsuccessfully demanded an opportunity to inspect all the books and records of the corporation, and praying for a writ of mandate giving him the right of unlimited examina-

tion of the records. Appellants answered, denying generally, and further alleged that all surplus money of the corporation had, with consent of the stockholders, been returned to the business; that the two concerns were business rivals; that respondent had tried, and was continuing to try, to injure appellants' business; that appellants, in manufacturing, used valuable processes and trade secrets, the formulas of which appeared upon their records; and that respondent was not acting in good faith. Trial was had, and, among other things occurring, the by-laws of the corporation were introduced in evidence and are before us. The by-laws do not vouchsafe to a stockholder the right to inspect the books or records of the company at any time. The judgment favored the relator to the extent that he be permitted to inspect the stock book, stock-transfer book, articles of incorporation, by-laws, minutes of board of trustees and of the stockholders' meetings; and it further provides that, in lieu of inspection of the account books, card indexes, etc., appellants should furnish a financial statement "in sufficient detail to give the relator reliable information as to the business condition of said corporation and inform him as to the value of his stock." Appellants admit the judgment protects the corporation against discovery to respondent of any of the trade secrets, but it is contended that the judgment is entirely too broad and places appellants at the mercy of a keen business competitor of personal hostility, and consequently is opposed to the best interests of the corporation.

The rule at common law on this subject is stated in *State ex rel. Weinberg v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208, to be:

"The stockholders of a corporation have at common law, for a proper purpose, and at seasonable times, a right to inspect any or all books and records of the

corporation. While this right is universally recognized, the courts disagree as to what is a proper purpose, or, rather, as to what facts are sufficient to warrant the court in directing by mandamus permission to inspect, where the stockholder has been refused such by the officers of the corporation."

The opinion then reviews many authorities, and continuing, says:

"We believe that these interests will be better protected by holding that a stockholder of a corporation has the right, at reasonable times, to inspect and examine the books and records of such corporation, *so long as his purpose is to inform himself as to the manner and fidelity with which the corporate affairs are being conducted and his examination is made in the interests of the corporation.* Nor will it be presumed, when such request is made, that the purpose of the inspection is other than in the interest of the corporation; and, when it is charged to be otherwise, the burden should be on the officers refusing such request, or the corporation, to establish it."

Afterwards, this court, in the case of *State ex rel. Gwin v. Bucklin,* 83 Wash. 23, 145 Pac. 58, L. R. A. 1915D 285, considered this subject from the standpoint of statute law or its equivalent—a by-law of the corporation—and in the decision, to be clear, the court first reminds one,

"We are not here concerned with the mere *common law* right of stockholders to examine the books and records of the corporation in which they hold stock, *which right is not absolute but subject to restrictions governed largely by the circumstances of each particular controversy.* The nature and extent of such common law right was reviewed by this court in *State ex rel. Weinberg v. Pacific Brewing & Malting Co.,* 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208, . . ."

Then, after noticing that the corporation in question in that case had a by-law as follows: "Each stockholder shall have the right to inspect the books and

records of the company at any time during regular business hours of said company," this court says: "This by-law, we think, has all the force and effect of a statute containing such a provision." The court, proceeding, reviews the authorities, some holding, in effect, that the clear legal right given by the statute cannot be defeated by stopping to inquire into motives, else the stockholder would be driven from the definite right given him by the statute to the field of uncertainty and delay, while other courts, including Alabama and Maryland, are not so strict in observing the statute, because, as they say, in effect, there might be good reason for refusing an application; for instance, if it were made for some evil, improper or unlawful purpose, alleged and proved. Concluding, this court says:

"Whatever the view of the court in this last quoted language is as to reasons and motives on the part of the stockholder warranting the custodian refusing inspection of the records, it is apparent that the fact that such stockholder is interested in a rival concern which is in competition with the corporation and might by the examination of the books of the corporation acquire and use knowledge in aid of the other concern to the detriment of the corporation by way of competition, his right to the inspection of the books would not thereby be affected in the least. It is possible that the Alabama and Maryland courts had in mind a possible inspection of the books and records of the corporation by a stockholder with a view of disclosing some secret process of manufacturing an article, possessed and used by the corporation, or where the motives and purpose of the stockholder would be to get temporary possession of a record for the purpose of mutilation or theft of the record or some other equally unlawful purpose. If the qualifying language of those courts means no more than this, we would be inclined to agree with them; but there is no such unlawful purpose of relators here alleged or shown. We are of the opinion

that the inspection of the books and records here sought by relators cannot be withheld from them on the ground that they would thereby acquire knowledge which would be used by them in aid of the business of their other abstract company, to the detriment of the Kitsap Title Abstract Company."

So the rule in this state is that, to the extent of rights given by statute or the by-laws of a corporation, the right of a stockholder to inspect the books, records and documents of the corporation may not be abridged or denied except in protection of necessary trade secrets or to combat some evil purpose alleged and proved, such as the theft or destruction of records, or similar improper purpose. While in those particulars beyond the influence of any statute or by-law, the right of a stockholder to inspect the books and records of the corporation shall emanate from a purpose not only to inform himself as to the manner of the conduct of the corporate affairs and the fidelity of its officers, but also that his examination is to be made in the interests of the corporation, which latter, while presumed, may be charged otherwise under penalty of the burden of proof.

Tested by such rules, and in the light of the pleadings and proofs in this case, appellants have just cause for appeal. To digress just a moment, it may be observed that this is not a case of a combination by persons holding a majority of the stock for their own interests to the exclusion and detriment of a minority holder, but rather one wherein, among other unusual circumstances, a person becomes the holder of a small number of shares of stock which had been practically dormant for years, so far as the active management of the affairs of the corporation is concerned, and immediately exacts from the officers of the corporation—business competitors, towards most of whom there is

personal hostility—the opportunity to examine all the books and records of the company for the pretended or alleged purpose of ascertaining the value of his stock and if there was anything to be distributed.

As already seen, there is no by-law of this corporation on the subject of inspecting the records. The only statute of this state touching this matter, so far as this case as presented to us is concerned, is Rem. Code, § 3701, to the effect that the trustees of every incorporated company shall keep a book containing the names of all persons, alphabetically arranged, who are or shall be stockholders of the corporation, and showing the number of shares held by each, which book, during the usual hours of the day, except Sundays and legal holidays, shall be open for the inspection of stockholders.

By specific allegations in the answer, appellants challenge that the interests of the corporation are at the heart of respondent, thus imposing the burden of proof thereof on appellants, which we are convinced by the record in this case they have met. Indeed, it is manifest the learned trial judge formed the same opinion as to the facts, only going too far in the relief ordered.

As seen already, there are cases in which, because of some exigency, a statute or by-law on this subject, according to the cold letter, may possibly not be successfully invoked, while in other circumstances, beyond the terms of a statute or by-law, each case, for the purpose of the application of the rule, is, as we consider this case, unique as to the merits. The provision of the judgment as to inspection of the articles of incorporation is needless, since they are of public record. As to an inspection of the minutes of the board of trustees and of the stockholders' meetings, as provided in the judgment, respondent is not entitled to it, nor

is he entitled to a financial statement to furnish information as to the business condition of the corporation and the value of his stock. Respondent is entitled to examine the books containing the names of the persons who are or shall be stockholders of the corporation, according to § 3701 of the code.

The cause is remanded to the lower court to modify and enter judgment according to these views.

Appellant will recover costs in this court.

MAIN, C. J., FULLERTON, TOLMAN, and PARKER, JJ., concur.

[No. 14626. Department One. July 16, 1918.]

O. E. ERIKSEN *et al.*, *Appellants*, v. MANUFACTURERS DISTRIBUTING COMPANY, *Respondent*.[1]

LANDLORD AND TENANT—TENANCY FROM MONTH TO MONTH—LEASE. Possession under an unacknowledged lease for a term of years, unenforceable under the statute of frauds, creates a tenancy from month to month, under Rem. Code, § 8803, relating to tenancies for an indefinite time.

FRAUDS, STATUTE OF—LEASE—INDIVISIBLE CONTRACT. Where a lease for a term of years is void under the statute of frauds for want of acknowledgment, it cannot be enforced as to obligations to be performed upon the expiration of the term, where its several stipulations are so interdependent that the parties contracted with a view to its performance as a whole.

Appeal from a judgment of the superior court for King county, Jurey, J., entered March 10, 1917, upon granting a nonsuit, dismissing an action on contract, tried to the court. Affirmed.

Byers & Byers, for appellants.

J. P. Wall, for respondent.

PARKER, J.—The plaintiffs, Eriksen and wife, seek recovery of damages which they allege resulted to them

[1]Reported in 173 Pac. 1095.

from the breach by the defendant of a lease contract. Trial in the superior court for King county resulted in judgment of dismissal and denial of recovery, upon motion made by counsel for defendant at the close of the plaintiffs' evidence challenging the sufficiency of the evidence to warrant any recovery by the plaintiffs. From this disposition of the cause, the plaintiffs have appealed to this court.

In April, 1914, these parties signed a contract purporting to be a lease of certain business premises in Seattle from appellants to respondent for the term of five years, commencing May 1, 1914, and ending May 1, 1919, at a rental of $250 per month. This contract was not acknowledged by either party, and respondent went into possession of the premises, continuing such possession and paying rent at the rate of $250 per month until February 29, 1916, when it vacated the premises and refused to further occupy the same or pay rent therefor. Respondent, being advised that the lease contract was not an enforcible contract because it had not been executed as required by law, in that its execution had not been acknowledged by either of the parties thereto, and being advised that the tenancy was in law only a tenancy from month to month, gave to appellants notice of its intention to vacate the premises and terminate the tenancy on February 29, 1916, at which time it did vacate the premises, having paid rent in full up to that time. It is plain that the notice of the termination of the tenancy was given strictly as required by Rem. Code, § 8803, and was effectual to terminate the tenancy, if it was in law a tenancy from month to month only. The damages sought to be recovered are such that appellants' right of recovery depends wholly upon the written lease being enforcible as such. Indeed, their claimed right of recovery is based wholly upon that contract.

The facts above summarized render our problem a very simple one in the light of our former holdings. We have repeatedly held that an oral or unacknowledged written lease is rendered unenforcible by our statute of frauds, though if a lessee enter into possession of premises under such a lease contract he becomes a tenant from "month to month, or from period to period on which the rent is payable," as provided by § 8803 relating to tenancies for an indefinite time: *Watkins v. Balch,* 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N. S.) 852; *Dorman v. Plowman,* 41 Wash. 477, 83 Pac. 322; *Ryan v. Lambert,* 49 Wash. 649, 96 Pac. 232; *Forrester v. Reliable Transfer Co.,* 59 Wash. 86, 109 Pac. 312, Ann. Cas. 1912A 1093; *Anderson v. Frye & Bruhn,* 69 Wash. 89, 124 Pac. 499; *Backus v. Feeks,* 71 Wash. 508, 129 Pac. 86, Ann. Cas. 1914C 553.

Counsel for appellants place some reliance upon the last cited decision as effecting a modification of our former holding, but, when critically read, we think it does not do so. That was not an action against a party to the unacknowledged lease, but against a surety of one of the parties thereto, guaranteeing performance of the contract by such party, and it was merely held that the statute of frauds was not available to the surety, though it would have been to the principal, who was a party to the lease.

Some contention is made in appellants' behalf that the lease contract should be held valid and enforcible, at least as to certain things therein agreed to be done by respondent. It seems plain to us, however, that this contract is not divisible. The obligations it imposes upon respondent for which damages are here sought by appellants, other than the payment of rent during the whole term, were to be performed upon the expiration of the term. We cannot say the parties would have

agreed to the several stipulations of the contract except in contemplation of it being a single contract to be viewed as a whole. *Anderson v. Frye & Bruhn, supra; Godefroy v. Hupp,* 93 Wash. 371, 160 Pac. 1056. In the last cited case, at page 377, Judge Ellis, speaking for the court, said:

"If the several stipulations of a single contract are so interdependent that the parties cannot reasonably be considered to have contracted but with a view to the performance of the contract as a whole, and any part of the contract is subject to the ban of the statute of frauds, then no recovery can be had upon any part of it."

It seems quite clear to us that the judgment of the trial court must be affirmed. It is so ordered.

MAIN, C. J., MITCHELL, TOLMAN, and FULLERTON, JJ., concur.

[No. 14669. Department One. July 16, 1918.]

EDWARD J. SANDERS, *Respondent,* v. HENRY L. PINNEY *et al., Appellants.*[1]

LOGS AND LOGGING—TIMBER CONTRACT—COVENANTS TO PUT IN POSSESSION—BREACH. Upon a sale of timber purchased from and standing on the land of another, with covenant that the vendee may go on the land to cut and remove the timber without let or hinderance, the vendor is bound to put the vendee in possession and is liable for damages for failure to do so, upon demand, when the owner of the land refused to allow the vendee to enter.

EVIDENCE—EXPERT OPINION—QUALIFICATIONS OF WITNESS. An expert as to the cost of logging and market value of logs is not disqualified because he had never been on the land, where he answered properly framed hypothetical questions based upon the proof.

APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated upon the exclusion of evidence where the witness was later permitted to testify.

[1]Reported in 174 Pac. 471.

LOGS AND LOGGING—CONTRACT—ACTION FOR BREACH—INSTRUCTIONS. Under an entire contract for the sale of timber upon two tracts of land, involving large expense in the construction of skid roads to remove any timber from either tract, it is proper to instruct that the whole contract is violated by failure to put the vendee in possession of a substantial part.

SAME—CONTRACT—BREACH—MEASURE OF DAMAGES. The measure of damages through failure to put a vendee in possession of land to cut and remove the timber purchased is the difference between the reasonable value of the merchantable timber sold and the cost of the cutting and placing it on the market, plus the amount agreed to be paid.

APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated upon giving an instruction where appellant had requested a similar one.

APPEAL—REVIEW—VERDICT—EXCESSIVENESS. A verdict for damages for breach of a contract for the sale of standing timber is not excessive, where there was evidence that the vendee's net profits were in excess of the verdict rendered.

Appeal from a judgment of the superior court for King county, Brawley, J., entered May 11, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Chas. D. Fullen and *J. M. Hawthorne,* for appellants.

Charles W. Johnson and *Ellis Lewis Garretson,* for respondent.

MITCHELL, J.—George Sheffield and wife owned and resided on forty acres of land, partly timbered, on Vashon Island, abutting on salt water, while back of and adjoining it were ten acres of timber land owned by appellants, Henry L. Pinney and wife. By a written conveyance, Sheffield and wife, as parties of the first part, conveyed to Henry L. Pinney, party of the second part, the timber on the forty-acre tract, except the fir on five acres, in consideration of $200, to be paid at the rate of $1 per thousand as the timber was removed, it being understood that this tract, as well

as the other one adjoining it, were to be shortly logged by the same person. The conveyance from Sheffield and wife to Pinney, among other things, says:

"It is understood that the party of the second part is about to enter into a contract to sell this timber and the timber standing on the adjoining land, at the rate of $1 per M. and so far as feasible the said party of the second part agrees to have the logging operations begun on the adjoining land; and out of the sales of said timber to advance to the parties of the first part towards the purchase price herein mentioned, money so received so that there will always be a margin of security for the said parties of the first part in the timber standing on the above described land while there is any unpaid balance due to them on this contract of sale, and the party of the second part shall have power to go upon said land and cut and remove the timber therefrom without let or hindrance."

The conveyance was duly acknowledged on March 15, 1916, and recorded in the auditor's office on October 16, 1916. The timber was to be removed on or before March 1, 1917. By a written contract for the purpose of logging, dated May 23, 1916, Pinney, as party of the first part, sold and conveyed to E. J. Sanders, respondent, party of the second part, in consideration of $1 per thousand for timber cut, to be paid as the logs were sold, all the timber on the ten-acre tract, and also the forty-acre tract (except the fir on five acres); and in this contract, immediately following the description of the real property, are these words:

"and the party of the second part shall have power to go upon said land and cut and remove timber therefrom without let or hindrance."

This contract provided for removal of the timber on or before March 1, 1917. About the date of this last contract, Sanders, upon completing the logging of a tract nearby, put his men on the Pinney ten-acre

tract, and, after cutting approximately 100,000 feet, was arranging to extend his operations onto the Sheffield tract, when he was informed by Sheffield that he could not enter and cut timber on his tract. The two tracts are conditioned topographically so that the timber on the ten-acre tract is not accessible to the water for transportation except over the Sheffield tract. Notwithstanding Sheffield's warnings, Sanders sent his men to the forty-acre tract in June, 1916, to prepare it for logging, whereupon Sheffield refused to let them enter to remove any of the timber. Sanders then applied, without avail, to Pinney to put him in possession. This action followed, Sanders claiming damages in the sum of $1,800, as follows: (1) Loss of profits, $1,000; (2) reasonable value of work in felling timber on the ten-acre tract, $300; and (3) loss of equipment and business by being forced out of business, $500. In answer to the complaint, Pinney and wife were content with general denials. There was a jury trial, during which the court eliminated all of plaintiff's demands except the one for loss of profits. The verdict was $1,000 for Sanders. Pinney and wife made, at the proper time, a motion for judgment notwithstanding the verdict, which was denied. There was a motion for new trial on all the statutory grounds, and it was denied in every particular. Pinney and wife appeal.

Appellants insist that, by the two instruments, Sheffield to them, thence to respondent, the standing timber became personal property segregated from the fee, the title passed carrying the right of possession and removal, which, if denied respondent by Sheffield, imposed no liability upon appellants. We are not persuaded by this argument. Sheffield's contract is an executory one, the timber to be paid for as logged, and under which no one was put in possession for the purpose of removing the timber, and yet appellants, by

the very terms of their contract with respondent, covenanted that he "shall have power to go upon said land and cut and remove the timber therefrom without let or hindrance." Language like this is not necessary to provide against hostility of the vendor, but it relates to all others. Besides, the proof shows Sheffield never objected to the removal across his tract of the timber cut on the other, which latter, according to the Sheffield contract, was to be sold and the stumpage price thereon paid to Sheffield as additional or marginal security for the stumpage price of the Sheffield timber. He only objected to the timber being removed from his tract until he had been paid. Appellants so understood the attitude of Sheffield, and after respondent had several interviews with Mr. Pinney and followed his instructions to get permission to remove timber, without success, Mr. Pinney said to respondent, "I haven't anything to do." And, as a fact, he did nothing. While it appears that respondent was told Sheffield had given a timber contract, he was never advised of its terms, and it was not placed of record until long after he had quit operations. Such failure of appellants to put respondent in possession of the timber was a breach of the contract, carrying liability. Whoever contracts that one may go upon land of another, occupied by that other, and cut and remove timber therefrom "without let or hindrance," thereby agrees to give possession, and not merely to give a chance of a lawsuit.

At the trial, respondent used a witness, who qualified as an expert, to testify as to the cost of logging and the market price of logs, which is alleged as error because the witness was never at the scene or place of logging involved in this case, a contention without merit, because the witness answered hypothetical questions properly framed and based on facts and condi-

tions of the scene of the operation already in proof, and, besides, appellants later on used a witness similarly circumstanced in the same manner and for the same purpose.

Again, it is charged as error that the court refused to permit a qualified witness, who had examined the locus offered by appellants, to speak as to the cost of logging and the market value of logs. True, the court did at first because of the form of the questions, but later the same witness did clearly testify as to both.

Appellants find fault with an instruction given the jury to the effect that, if another kept respondent from going on the land to cut timber, claiming there was no right to do so, and appellants were informed thereof, it would be the duty of appellants, under the contract with respondent, to put respondent in possession for the purpose of removing the timber within the time provided, and that appellants would not be relieved if denial of possession related to less than the whole, if it was substantial. The instruction was right, considering the situation. The contract as to both parcels was an entire one, and to move any of the timber required the expenditure of such large sums and the use of so much timber for construction of skid roads that respondent had the right to treat the whole contract as violated upon failure to get possession of so large a part of the timbered land. As to respondent, the contract was not apportionable; certain necessary overhead expenses would be prohibitive if confined to the removal of a small portion of the timber, but otherwise if used to move all of it. By implication, appellants, in their pleading, confess this view, because, in answering, they do not seek anything for stumpage on account of the timber cut on their ten acres, but rest solely on general denials.

The court gave the jury an instruction as follows:

"You are instructed that, if you should find in favor of the plaintiff in this action, the measure of damages which must govern your verdict would be as follows: The plaintiff would be entitled to receive such a sum in money as would represent the difference between the reasonable market value of the merchantable timber sold and conveyed under said contract and the cost of cutting, transporting and placing the same upon the market when added to the amount or sum which the plaintiff agreed to pay the defendant for said timber. By 'reasonable market value' is meant that sum which said timber would bring, when manufactured into merchantable timber, upon the open market, that is, when sold by an owner of the same who is willing but not compelled to sell the same, to a buyer who is able, ready and willing to buy such timber but not compelled or under any necessity of buying the same."

It is claimed that such instruction was erroneous as to the measure of damages and the definition of market value. As to the first, in addition to its being correct, it is to be observed that appellants requested the court to give an instruction in harmony with it as follows:

"If you find from the evidence that the plaintiff, Sanders, could not have made any profit out of the transaction in question, then Sanders has not been damaged and in that event your verdict must be for the defendants,"

which, of course, was in effect given by the court, considering the whole of the instructions. As to the other, definition of reasonable market value, the court used an approved and proper form.

Again, it is contended the verdict is excessive, and that, indeed, no damage was shown. True, there was evidence to sustain such view, but there is a dispute, and the inquiry here is to see if there is proper and substantial evidence to uphold the verdict. We find there is. There is proof to show there were at least

700,000 feet of timber on the two tracts; the expense of logging, $5 per thousand; stumpage, $1 per thousand; and $200 for roads and landings, making a total cost of $4,400, while the market value was $8 per thousand, equaling $5,600 for the timber, thus showing a profit of $1,200, while the verdict was $1,000.

What has already been said shows the trial court was right in denying the motion for judgment *non obstante.*

Judgment affirmed.

MAIN, C. J., FULLERTON, TOLMAN, and PARKER, JJ., concur.

[No. 14744. Department One. July 16, 1918.]

RICHARD RINNE, *Appellant,* v. WILLIAM J. WILSON *et al., Respondents.*[1]

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE. The authority of an agent to deliver deeds for an exchange of property is sufficiently established where the principal's subsequent acts, if not amounting to a ratification, makes the proof, as a whole, conclusive.

EXCHANGE OF PROPERTIES—JUDGMENT — DECREE. Upon sustaining an exchange of properties, and allowing defendant's claim for one-third of the crop taken from the land obtained by him, as per agreement, it is error to decree the same a lien upon the land conveyed to plaintiff, other than as the same becomes a lien upon entry of a money judgment therefor.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered April 17, 1917, upon findings in favor of the defendants, in an action for equitable relief, tried to the court. Affirmed in part and reversed in part.

W. W. Keyes, for appellant.

Ballinger, Battle, Hulbert & Shorts, for respondents.

[1]Reported in 174 Pac. 16.

PARKER, J.—The plaintiff, Rinne, commenced this action in the superior court for King county, seeking a decree requiring the defendant Wilson to reconvey to him good title to a quarter section of land situated in the province of Alberta, Canada; and, in the alternative, for damages against all of the defendants in the sum of $5,000. The defendants resist the claims of the plaintiff, asserting that Wilson received conveyance of the Alberta land from Rinne in exchange for land conveyed by him to Rinne, situated in this state. The defendant Wilson, by his cross-complaint, seeks specific performance of the exchange contract in so far as it is unperformed by the plaintiff, Rinne, claiming that Rinne has failed to pay him the sum of $133.30, the proceeds of the crop produced upon the Alberta land, which Rinne collected after the exchange of the lands and which it was agreed should go with the Alberta land to Wilson, this being the only respect in which the exchange contract remains unperformed. The defendant Wilson also seeks to have this $133.30 decreed to be a lien upon the Washington land conveyed by him to Rinne, should Rinne fail to pay the same. Trial in the superior court for King county resulted in findings and judgment denying to the plaintiff the relief prayed for by him, and awarding recovery to Wilson of the $133.30 as prayed for by him. From this disposition of the cause, the plaintiff has appealed to this court.

Preliminary to stating the facts of the case, it may be well to state that the main controversy is as to the authority of the respondent Kessinger, as agent of Rinne, to make the exchange contract and deliver the deed of conveyance which was executed by Rinne to Wilson for the Alberta land.

On October 28, 1916, Rinne owned two quarter sections of land in the province of Alberta; one was in-

cumbered by a mortgage for $1,800, and the other was incumbered by a mortgage for $500. The latter was also under crop lease to one Foster, by the terms of which Rinne was to receive as rent one-third of the crop grown thereon. At the same time, Wilson owned, free from incumbrance, two forty-acre tracts of land in Kitsap county, in this state, one of which was improved and the other unimproved. Kessinger, a real estate agent, was then the agent of Rinne for the purpose of effecting a sale or exchange of his Alberta lands. He did not, however, then have any authority to sign or execute for Rinne any contract to convey the Alberta lands. On that day, Kessinger brought Wilson and Rinne together at Seattle, who signed a contract looking to the exchange of the Alberta and Washington lands, executing deeds of conveyance each to the other for his lands, and deposited them with Sewall & Powell, real estate agents of Seattle, pending the consummation of the contemplated exchange. This contract was, in form, a letter addressed to Sewall & Powell, signed by Wilson and Rinne, and contained, among other things, the following:

"We authorize you to hold these documents for a period of fifteen days from date, subject to the order of the said William J. Wilson, who shall have the said fifteen days to inspect the Alberta property. If Mr. Wilson finds the property satisfactory and notifies you to that effect, you are hereby authorized to deliver the warranty deed to Richard Rinne or his order and the Alberta transfers to William J. Wilson or order."

Wilson, having caused the Alberta lands to be examined by his agent there, concluded that he would not consummate the exchange, and notified all parties concerned accordingly, within the fifteen-day period named in the contract. This, it is conceded, put an end to the exchange contemplated by that contract, leaving each party without obligation thereunder. On

November 10, 1916, Rinne gave to Kessinger an order on Sewall & Powell for the deeds he had executed conveying his Alberta lands to Wilson. Kessinger, continuing his efforts, as agent for Rinne, to effect a sale or exchange of his Alberta lands or a part thereof, entered upon further negotiations with Wilson looking to Rinne exchanging with Wilson the Alberta quarter section incumbered by the $500 mortgage for the Washington improved forty-acre tract. These negotiations resulted in Wilson making a proposition to Kessinger, which Kessinger states in his testimony to have been as follows:

"The proposition was that he was to give us, that is, he would give Mr. Rinne, the improved forty acres over there, free and clear of incumbrances, and would assume a mortgage for $500 on the one hundred and sixty acres in Alberta, and interest and taxes if they didn't exceed $100, and he was to get the crop on the land."

Soon thereafter Kessinger reported to Rinne this proposition of Wilson's, as we think the evidence shows, so that Rinne plainly understood it. Rinne then directed Kessinger to go ahead and make the exchange with Wilson upon those terms. In the meantime, the deed of conveyance from Rinne to Wilson for the Alberta quarter section subject to the $500 mortgage had remained in the possession of Kessinger, as Rinne's agent, which lacked nothing to become effective save delivery. We think the evidence warrants the conclusion that Rinne left this deed with Kessinger to the end that he might deliver it in the consummation of this deal. Kessinger, being so authorized to proceed, thereafter, on November 13, 1916, as agent for Rinne, entered into a written contract with Wilson, in form a letter to Sewall & Powell, accompanied by this deed to the Alberta quarter-section subject to the $500 mortgage, and a deed from Wilson

to Rinne for the Washington unimproved forty-acre tract, which contract reads as follows:

"Seattle, Wash., Nov. 13, '16.

"Sewall & Powell,
"108 Cherry St.,
"Seattle, Wash.

"Dear Sirs: We herewith hand you transfer of title Richard Rinne to Wm. J. Wilson and John J. Mulvey to certain lands in the Province of Alberta and warrant deed, William J. Wilson to Richard Rinne, to certain lands in the state of Washington, this being the S. E. ¼ of S. W. ¼ sec. 32—twp. 23 range 1 (this is the improved 40 that was in former escrow).

"We authorize you to hold these documents for such time as will be necessary to secure abstracts of title and tax notices on the Alberta land.

"If interest on mortgage, taxes, etc., together with mortgage do not exceed $600, you are authorized to deliver deed to Washington land to Richard Rinne and transfer of title to Wm. J. Wilson covering Alberta land.

Yours very truly,
"(Signed) R. Rinne,
"By H. P. Kessinger, Agent,
"W. J. Wilson."

Thereafter title to the Alberta land appearing satisfactory to Wilson and he being satisfied that the mortgage debt against the land, with interest and taxes, did not exceed $600, at the instance of Wilson and Kessinger, as agent for Rinne, the deed to the Alberta land was delivered to Wilson and the deed to the Washington land was delivered to Kessinger, as the agent of Rinne. On November 15, 1916, Wilson by letter notified Foster, the lessee of the Alberta land, that he had purchased the land and succeeded to the right of Rinne as to the one-third of the crop of the land for that year. This brought an answer from Foster saying that he had sent to Rinne's agent $133.30, being the proceeds of one-third of the crop due as rent for that year. The evidence, we think, plainly calls for the con-

clusion that Rinne received through his agent this money from Foster. Thereafter, upon demand made by Wilson of Rinne for this money, Rinne did not refuse to pay the same or abide by the exchange as consummated, but requested that he be allowed further time to pay the same and promised to secure its payment by a mortgage upon the land he received in the exchange. This was assented to by Wilson, and a mortgage was prepared accordingly and given to Rinne for execution, which he took, evidently intending to sign and acknowledge it, which, however, was never done, and the $133.30 remains unpaid to Wilson. After the delivery of the deeds as above noticed, Rinne visited the Washington land which he received in the exchange, with a view, as we think the evidence shows, of locating its exact boundaries upon the ground, and having found them, expressed himself as well satisfied with the land, rather than asserting his intent to not abide by the exchange as consummated by his agent, Kessinger. Thereafter, shortly before the commencement of this action, sometime in December, 1916, Rinne first evidenced his intention to repudiate the exchange and not be bound thereby. These, we think, are the controlling facts.

This, we think, is one of those cases which call for but little argument touching the rights of the parties, when the facts are stated. While considerable of the argument is directed to the question of Kessinger's authority to enter into and sign the written contract, as agent of Rinne, with Wilson, the controversy resolves itself into the question of Kessinger's authority to deliver the deed executed by Rinne to Wilson for the Alberta land, upon the conditions named in the contract. It seems quite clear to us that, whatever may be said as to Kessinger's authority to enter into that

particular written contract and render it binding upon the parties as a contract within itself, it must be decided, in the light of all the facts, that Kessinger was authorized by Rinne to deliver the deed to Wilson upon the conditions stated in that contract; and that the subsequent acts of Rinne, if not in themselves amounting to a ratification of the delivery of the deed, makes the proof, as a whole, all but conclusive that Kessinger was authorized to deliver the deed in consummation of the exchange which his principal, Rinne, had authorized him to make with Wilson.

Contention is made in behalf of appellant that the trial court erred in awarding Wilson recovery of the $133.30 and in making the same a lien upon the Kitsap county land. As already stated we think the evidence clearly warranted the trial court in concluding that Rinne had actually received this money from Foster when it should have been paid to Wilson. We are of the opinion, however, that the trial court erred in decreeing the $133.30 judgment against Rinne and in favor of Wilson a specific lien upon the Kitsap county land. Of course it may become a lien upon that land as a general judgment, but that is another matter.

We conclude that the judgment should be affirmed in so far as it denies to appellant Rinne the relief prayed for by him. It is so ordered. We also conclude that the judgment should be reversed in so far as it awards to Wilson a lien upon the Kitsap county land for the $133.30 recovery awarded him against Rinne. To the end that Wilson's recovery be made plain upon the records of the superior court, we direct that court to enter a simple money judgment against Rinne and in favor of Wilson for the sum of $133.30 with interest thereon from January 1, 1917, which is, in any event, as late a date as Wilson was entitled to be paid that amount by Rinne. In view of this disposition of the

cause, we are of the opinion that no costs in this court should be awarded to any of the parties as against the others. It is so ordered.

MAIN, C. J., FULLERTON, TOLMAN, and MITCHELL, JJ., concur.

[No. 14768. Department One. July 16, 1918.]

JOHN ARISHIN, *Respondent*, v. KING COUNTY, *Appellant*.[1]

STATUTES — REPEAL BY IMPLICATION — COUNTIES — LIABILITIES — TORTS. Under the rule that repeals by implication are not favored, the general statute, Rem. Code, § 951, giving a right of action against a county to a person injured by some act or omission of the county, is not impliedly repealed by Id., § 3987, defining the duties of the sheriff, and providing that the county is not responsible for the acts of the sheriff while engaged in his official duties as defined therein.

COUNTIES — LIABILITIES — TORTS — ACTS OF DEPUTY SHERIFF. A deputy sheriff, in charge of automobiles used by the sheriff's office, is not, while testing an automobile, engaged in the performance of any official acts of the sheriff for which the county is not liable, under Rem. Code, § 3987; hence the county is liable for personal injuries caused through the negligent driving by such deputy.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 20, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Affirmed.

R. L. Blewett, Alfred H. Lundin, S. M. Brackett, and *Hoyt & Frye,* for appellant.

Kazis Krauczunas and *J. Grattan O'Bryan,* for respondent.

TOLMAN, J.—This appeal is from a judgment entered upon a verdict returned by a jury in favor of the respondent and against the appellant in the sum of $1,-

[1]Reported in 173 Pac. 1020.

000, as damages for the wrongful death of the respondent's minor child.

On March 21, 1917, one Con Buchet, then a deputy sheriff of King county, whose duty it was to repair, care for and drive the automobiles belonging to King county and furnished by it for the use of the sheriff, was asked by another deputy, then about to go to the county jail for a prisoner, to get into the automobile used by him as such deputy and ascertain what, if anything, was the matter with it. The two deputies, instead of taking the direct route from the sheriff's office to the county jail, proceeded in another direction for the purpose of testing the automobile, going up Jackson street, in the city of Seattle, some distance beyond Twelfth avenue, and while returning, in the vicinity of Twelfth avenue, the accident complained of occurred.

At the close of the respondent's case, the appellant moved for a nonsuit, upon the ground that the person driving the automobile at the time of the accident was a deputy sheriff in the employ of the appellant, and that the appellant was not, as a matter of law, liable for the act of such deputy. The court denied the motion, the appellant elected to stand thereon and refused to offer evidence in defense, and the jury returned its verdict. Whereupon the appellant moved for judgment *non obstante* and for a new trial, both of which motions were denied, and a judgment was entered on the verdict. Upon all of which rulings error is assigned.

It is admitted by both parties that Con Buchet, the then driver of the car, was a duly appointed, qualified, and acting deputy sheriff of King county at the time of the accident. And in addition to the usual duties of a deputy sheriff, he was required to repair, care for, and drive the automobiles belonging to King county which were furnished by it to the sheriff for his use.

The head deputy says it was his duty to care for the automobiles. And he himself testifies that he had charge of the three automobiles used by the sheriff's office.

The appellant contends that the driver, Buchet, being in fact a deputy sheriff at the time of the accident, the county is not liable for his act because of Rem. Code, § 3987, which defines the general duties of a sheriff and, immediately following such definition, says: "The county is not responsible for the acts of the sheriff." Which statute, it is contended, has superseded or repealed by implication the general statute, Rem. Code, § 951, which provides:

"An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation."

It is true that the special statute was enacted long after the general statute; but it does not purport to cover the subject-matter of the senior statute, contains no words of express repeal, and if it repeals it at all, it must be by implication.

Repeals by implication are not favored by this court. In *Leavenworth v. Billings,* 26 Wash. 1, 66 Pac. 107, cited with approval in *Mathews v. Wagner,* 49 Wash. 54, 94 Pac. 759, we said:

"Repeals by implication are not favored. A statute will not be construed as repealing prior acts, in the absence of express words to that effect, unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand, and to comprise in itself

the sole and complete system of legislation on that subject."

Again, in *Mesher v. Osborne,* 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917, quoted with approval in *Brunner v. Little,* 97 Wash. 319, 166 Pac. 1166, this court said:

"Repeals by implication are not favored and will only be indulged where the implication is a necessary one, that is, where without an implied repeal of the earlier act there would exist an inharmony in the body of the law irreconcilable on any conceivable theory reasonably compatible with the purpose of the later act."

This may be taken to be the settled law of this state. Reading, then, the two statutes together, we find that the senior statute gives a right of action to a person injured by some act or omission of the county, while the junior statute provides simply and solely that the county shall not be liable for the acts of the sheriff while engaged in his official duties as therein defined. We find no such irreconcilable repugnancy between the two acts as to lead to the belief that the junior act superseded, or was intended to supersede, the senior act, and therefore hold that the senior act has not been repealed.

Nor was the deputy Buchet, at the time of the accident complained of, engaged in the performance of any official act necessary to be performed by a sheriff or his deputy. And the appellant cannot in this case shelter itself under § 3987, *supra.* The deputy sheriff was, in fact, engaged at the time of the accident in testing or repairing the automobile belonging to King county, a work which could have been done by any person having the requisite skill, and his commission as deputy sheriff cast no shield or cloak over him. His acts were the acts of an ordinary mechanic, such as

King county might have hired at the nearest garage for such a duty. And the county can claim no immunity because its mechanic in this instance was commissioned as a deputy sheriff.

Finding no error, the judgment of the trial court will be affirmed.

MAIN, C. J., MITCHELL, FULLERTON, and PARKER, JJ., concur.

[No. 14779. Department Two. July 16, 1918.]

EDWARD PETERSON, *Respondent*, v. CHRIS PALLIS, *Appellant*.[1]

MUNICIPAL CORPORATIONS—USE OF STREETS—ACTIONS FOR NEGLIGENCE—PLEADING. In an action for personal injuries sustained in a collision with an automobile, a complaint, alleging that defendant was driving at an unlawful speed and pleading an ordinance fixing the speed limit at twenty miles an hour, is good as against a motion to strike or make more definite and certain; Rem. Code, § 291, providing that the court shall take judicial notice of an ordinance so pleaded.

SAME—USE OF STREETS—ACTIONS FOR NEGLIGENCE—INSTRUCTIONS. In an action for personal injuries sustained in a collision with an automobile, it is error to instruct that the defendant would be liable if it was found that he was driving on the wrong side of the street, where he was on the wrong side to avoid automobiles parked on the right side, and since it was not negligence *per se* to drive on the wrong side.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 12, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Ryan & Desmond, for appellant.

Oscar G. Heaton, for respondent.

[1]Reported in 173 Pac. 1021.

CHADWICK, J.—This action arises out of a collision between plaintiff's motor-cycle and defendant's automobile. Trial was had, resulting in a verdict in favor of plaintiff.

It will be necessary to notice but two assignments of error. The first is that the court erred in overruling the motion to strike certain matter from the amended complaint, and thereafter erred in denying defendant's motion to make the complaint more definite and certain. Plaintiff alleges:

"That said accident happened more particularly as follows, to wit: the plaintiff is in the employ of the Seattle Construction and Dry Dock Co., as a ship carpenter and received a salary of $7.50 per day of ten hours; that on the day in question, which was Saturday, the employees of said company ceased work at noon; that a large number of them were crossing said Whatcom avenue at the hour above mentioned; that plaintiff was on the south side of said body of men, on his motor-cycle and was not going faster than three or four miles per hour, and had reached a point past the middle or east of the middle line of said street and was just in the act of turning north upon the east side of said street when the defendant, driving negligently and carelessly and at an unlawful rate of speed in a southerly direction upon the easterly side of said avenue, struck plaintiff's motor-cycle, turning it around in the opposite direction from which it was going, and knocked plaintiff off said motor-cycle and ran completely over said plaintiff and his said motor-cycle."

This was followed by a plea of ordinance No. 24,597 of the city of Seattle, by title. The statute, Rem. Code, § 291, provides that, when an ordinance is so pleaded, the court shall take judicial notice of the ordinance and its tenor and effect. It is provided in the ordinance that automobiles shall not be driven at a speed greater than twenty miles per hour between street intersections. The legal effect of the pleading is that the auto-

mobile was driven at a greater speed than twenty miles an hour. The allegation, therefore, that the automobile was driven at an unlawful rate of speed and upon the easterly side of the avenue, made the complaint good as against a motion to strike and a motion to make more definite and certain.

The court instructed the jury that it might find a verdict against the defendant if it found from the evidence that he was driving his machine on the wrong side of the highway. This instruction was erroneous for two reasons. One is that the defendant was not driving his machine on the wrong side of the highway. That he was on the wrong side of the highway at the time the accident occurred may be admitted, but the testimony shows that he turned his machine to the wrong side of the highway in order to avoid vehicles that were parked along the right-hand side of the street, and continued in furtherance of an ill-timed attempt to avoid striking the plaintiff. The other reason for holding the instruction bad is that, ever since the case of *Segerstrom v. Lawrence,* 64 Wash. 245, 116 Pac. 876, we have held that it is not negligence *per se* to drive on the wrong side of a highway. Such a showing would make a *prima facie* case against one so charged and put upon him the burden of justifying his position, but beyond this the law does not go. Berry, Automobiles (2d ed.), § 171; *Hartley v. Lasater,* 96 Wash. 407, 165 Pac. 106; see, also, *Sheffield v. Union Oil Co.,* 82 Wash. 386, 144 Pac. 529.

The mere driving of a machine on the wrong side of a street will not sustain a verdict unless it is shown that it was the proximate cause of the injury.

The jury was instructed upon the doctrine of the last clear chance. Without reviewing the testimony, we are convinced that there is no room for the application of that doctrine in this case. Inasmuch, however, as

this doctrine depends upon the facts of the particular case, and since the case must be retried, we leave that question without discussion and to the discretion of the trial judge, who will hear the case upon a new record.

Reversed and remanded for a new trial.

MOUNT and HOLCOMB, JJ., concur.

[No. 14877. Department One. July 16, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Dorothy Alden De Bit, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Ben Sheeks, Judge, Respondent.*[1]

INFANTS—CUSTODY OF DELINQUENTS—POWERS OF COURT—MODIFICATION OF ORDER. A conditional order for the custody of a delinquent child, reserving control of the child in the court for one year, may be modified upon reasonable notice within the year, without the necessity of summons or notice required by statutes relative to the modification of judgments.

Application filed in the supreme court June 14, 1918, for a writ of prohibition to prevent the superior court for King county, Sheeks, J., from entering an order modifying a decree respecting the custody of a minor. Denied.

J. H. Templeton, for relator.

L. F. Chester, for respondent.

PARKER, J.—The relator seeks a writ of prohibition from this court prohibiting the superior court for King county from entering an order modifying its former order conditionally awarding the custody of the minor nine-year old child of the relator and Rudolph H. Gerber, her former husband, to the latter.

[1]Reported in 173 Pac. 1014.

In December, 1917, the child had been, by order of the superior court for King county, placed in charge of the Holy Names Academy, of Seattle, as a ward of the court. While the record before us is not specific as to the cause of the placing of the child in the charge of the academy, the record, read in the light of argument of counsel, warrants the assumption that the child was being dealt with and held as a dependent child by the juvenile department of the superior court for King county. While the child was so in charge of the academy, the father, Rudolph H. Gerber, commenced habeas corpus proceedings in the superior court for King county, seeking the child's custody. Thereupon the mother, this relator, intervened in that proceeding, and the controversy thereupon became one between the father and mother as to which, if either, was entitled to the custody of the child. That proceeding resulted in an order which, omitting its formal parts and recitals, reads:

"It Is Therefore Ordered, Adjudged and Decreed by the court that the care, custody, education and maintenance of said child Anael Gerber be and the same is hereby awarded to its father, Rudolph H. Gerber, the petitioner, and that said Holy Names Academy and Normal School be and it is hereby ordered and directed to surrender said child to said petitioner.

"It is further ordered that prayer of intervener, Dorothy Alden De Bit, be and the same is hereby denied.

"It is further ordered by the court that said child be kept here in the city of Seattle for the period of one (1) year from the date hereof, after which time the father may, if he desires, petition this court for permission to remove said child, the determination of which is postponed until the question arises.

"It is further ordered that the mother of said child, Dorothy Alden De Bit, be and the privilege is hereby granted to visit said child as often as twice a week within reasonable hours and for a reasonable time.

"This decree shall be and remain in full force and effect unless otherwise ordered by this court, upon some conditions or contingency hereafter justifying or requiring a modification hereof."

On May 18, 1918, the father, Rudolph H. Gerber, moved the superior court for a modification of that order in so far as it required him to keep the child in the city of Seattle for one year. The motion was made in the original habeas corpus proceedings, which, as we have noticed, had become a controversy between the father and mother for the custody of the child. The motion was, by the court, set for hearing on June 4, 1918, and the mother, this relator, was notified in writing of such hearing more than ten days prior thereto. This notice was not in the form of a summons, nor was it given more than twenty days prior to the hearing, nor is it pretended that the proceeding seeking modification of the order is a new and independent proceeding. On the day of the hearing, the mother appeared specially and objected to the jurisdiction of the court to hear and determine the allegation and prayer of the motion made by the father. This challenge to the court's jurisdiction being overruled, the judge proceeded to hear the matter upon the merits, at the conclusion of which he announced his intention to modify the decree in so far as it required the father to keep the child in the city of Seattle for the time specified in the order, which modification would enable the father to take the child away from the city of Seattle to his home in California, where apparently he intends to take it when permitted by the court to do so. This application to prohibit the superior court from so modifying its order was thereupon made.

Counsel for relator contends that the superior court had no jurisdiction to modify its order awarding the custody of the child to the father and relieve him from

the duty of keeping it in the city of Seattle for the period of one year. Counsel proceeds upon the theory that the order sought to be modified was a final order and became *res adjudicata* of all the matters therein determined, and that, therefore, its modification in no respect could be sought or obtained other than in the manner provided in our statutes relating to the modification and vacation of judgments. We cannot agree with this contention. In view of the fact that the child was the ward of the superior court for King county as a dependent child when it was conditionally awarded to the father, and in view of the language of the order which manifestly reserves control of the child in the court for one year, we think the jurisdiction of the court was continuing, enabling the court to make such order relative to the child's custody and residence as it deemed wise, which order could be made either in the original juvenile court proceeding or in the habeas corpus proceedings, which, in effect, also became a juvenile court proceeding. It follows that notice or summons as required by our statutes relative to the modification of judgments was not required, and that the jurisdiction of the superior court was such that any reasonable notice to the relator, the mother, enabling her to be heard upon the disposition of the motion for modification was sufficient. We are quite clear that the notice given her in this case was sufficient. Rem. Code, § 1987-15. *State ex rel. De Bit v. Mackintosh,* 98 Wash. 438, 167 Pac. 1090.

We conclude that the writ must be denied. It is so ordered.

MAIN, C. J., MITCHELL, TOLMAN, and FULLERTON, JJ., concur.

[No. 14765. Department Two. July 17, 1918.]

GEORGE W. HILL *et al., Respondents,* v. J. M. ARTHUR *et al., Appellants.*[1]

CONTINUANCE—GROUNDS—ABSENCE OF WITNESSES—DILIGENCE. It is not an abuse of discretion to refuse a continuance to secure the testimony of a witness upon a subject put in issue by the pleadings and a matter of dispute throughout the case, where it would have been merely cumulative and there was want of diligence in not subpoenaing him.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS TO INSTRUCTIONS. Exception to instructions and to the sending of irrelevant instructions to the jury room, not called to the court's attention, will not be considered on appeal.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered July 9, 1917, upon the verdict of a jury awarding damages in condemnation proceedings. Affirmed.

Fred M. Bond, for appellants.

N. H. Bloomfield and *F. D. Couden,* for respondents.

MACKINTOSH, J.—The plaintiffs, as commissioners of drainage district No. 3 of Pacific county, in this action condemned property of the defendant, the jury first assessing the damages and then determining the benefits. After the verdict as to the damages, the defendant moved for a continuance of the trial as to the benefits, to enable the procuring of a witness named Williams, whose testimony was alleged to be necessary and material. One of the errors assigned is the denial of this motion. Other assignments relate to the giving of certain instructions and the sending of others to the jury room, and the admission of expert testimony.

The defendant was a cranberry grower, and a great deal of the testimony related to methods used by suc-

[1]Reported in 173 Pac. 1092.

cessful growers, the witnesses for both parties referring continually to the operation of the Williams, Arthur and Adams bogs, one of the principal points dwelt upon being the methods used by Williams on his bog and the reasons therefor, this issue having been tendered by the defendants' claim of damages to their bog by reason of the construction of the ditch. Neither side had subpoenaed Williams, though several witnesses were present from the vicinity of his residence, some fifty miles from the place of trial. A witness, called in rebuttal by the plaintiff on the trial as to damages, testified that he, having laid out the Williams' bog and being familiar with its operation, knew the reasons moving Williams to the use of certain methods of handling the ditches and water on his bog. The defendants desired to have a continuance of the trial as to the benefits to secure Williams to testify that the reasons assigned to him were not the ones actually moving him in his operation of his property.

We see no abuse of discretion in refusing this request, for the entire matter regarding Williams' bog was raised by the defendants, and, before the trial, they knew that they would seek to prove how Williams was taking care of his crop, and due diligence required that, when subpoenaing other witnesses in the same locality to testify regarding these very matters, Williams should have been included. The ultimate fact to which Williams would have testified had already been covered by other witnesses for the defendant, and his testimony would have been but cumulative in any event. Moreover, no showing is made that any effort to obtain Williams' presence would have been unsuccessful if it had been made between the time of the trial as to damages and the beginning of the hearing on the question of benefits.

Also in the discretion of the trial court rested the determination of the qualification of the witnesses called as experts, and there was no such abuse as would justify our interference.

The record does not disclose that the exceptions taken to the instructions complained of and to the alleged sending of irrelevant instructions to the jury room were called to the court's attention, and we, therefore, cannot now consider them.

Other minor assignments of error were not urged upon oral argument, yet we have examined them and find them without merit.

Judgment is affirmed.

MAIN, C. J., HOLCOMB, MOUNT, and CHADWICK, JJ., concur.

[No. 14588. Department Two. July 19, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. HARRY JOHN, *Appellant*.[1]

CRIMINAL LAW—EVIDENCE—MOTIVE. Where there was abundant evidence to identify the accused as one of the parties committing an assault by firing a revolver at the prosecuting witness, it is not necessary to show a motive for the assault.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered August 8, 1917, upon a trial and conviction of assault in the first degree. Affirmed.

William R. Bell and *Walter S. Fulton*, for appellant.

Alfred H. Lundin and *Frank P. Helsell*, for respondent.

MOUNT, J.—Appellant was convicted on a charge of assault in the first degree upon one Louie James. He

[1]Reported in 173 Pac. 943.

appeals from a sentence based upon the verdict of the jury. He makes but one assignment of error, viz.: that the verdict is contrary to the law and the evidence.

It appears that, on the 5th day of March, 1917, one Louie James, a Chinaman, was assaulted by two other Chinamen upon the streets of Seattle. While the prosecuting witness was walking along the street, two Chinamen, armed with pistols, began shooting at him. He escaped, and the appellant, Harry John, and another Chinaman were arrested. The other Chinaman pleaded guilty, and the appellant entered a plea of not guilty.

Appellant's contention appears to be that there was no sufficient evidence of his identification, and that there was no motive shown for the assault; and that, for these reasons, we should hold that the evidence is insufficient. There is abundant evidence in the record to identify the appellant as one of the parties who assaulted the prosecuting witness by firing a number of shots from a revolver at the prosecuting witness. He was identified by at least four witnesses who saw the occurrence and who did not hesitate to identify him. Where the evidence is positive, as it is in this case, it is not necessary that there should be a motive shown for the assault.

The record convinces us beyond doubt that the appellant was one of the guilty parties.

The judgment is therefore affirmed.

MAIN, C. J., CHADWICK, FULLERTON, and HOLCOMB, JJ., concur.

[No. 14590. Department Two. July 19, 1918.]

A. N. THOMPSON, *Respondent*, v. M. J. UNZELMAN, *Appellant*.[1]

APPEAL—REVIEW—FINDINGS. Upon reviewing questions of fact, findings must be sustained if supported by a preponderance of the evidence.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered June 12, 1917, upon findings in favor of the plaintiff, in an action on promissory notes, tried to the court. Affirmed.

Kerr & McCord, for appellant.

Robert D. Hamlin, for respondent.

MAIN, C. J.—This action was instituted to recover judgment on three promissory notes made and delivered by appellant to respondent, payable to the order of respondent.

Appellant admits the making and delivery of the notes and defends affirmatively, alleging that the consideration for making the notes was an assignment and delivery by respondent to appellant of a chattel mortgage executed by a third party to respondent, and that, prior to such assignment and delivery, the respondent had given a release of the chattel mortgage, and that, therefore, the notes sued on were without consideration and given through mistake and error.

Replying to such answer, respondent, in addition to general denials of the affirmative matter, alleges further facts connected with those asserted in the affirmative matter of the answer, which, in our view of the case, it is not necessary to detail. The cause was, by consent, tried without a jury, decided in favor of

[1]Reported in 173 Pac. 1091.

respondent, and judgment entered accordingly upon proper findings and conclusions.

True, appellant presented and demanded counter findings, and, upon having them refused, duly took exceptions; still, as we understand the whole case, in the trial *de novo* here, all the assignments of error necessary to be noticed are reducible to one claim, that the findings made are not supported by a preponderance of the evidence.

It is clear that the case presents only questions of fact. In such case, it is our duty to weigh the evidence and sustain the findings of the lower court if they are supported by a preponderance of the evidence as we view it.

Guided by such rule, the evidence in this case has been examined and weighed, resulting in the opinion that the trial court was right. Such conclusion obviates the necessity of analyzing the evidence, which otherwise might be advisable.

Judgment affirmed.

HOLCOMB, MOUNT, and CHADWICK, JJ., concur.

[No. 14653. Department Two. July 19, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK MILLROY, *Appellant*.[1]

FALSE PRETENSES—INFORMATION—SUFFICIENCY. An information for obtaining money under false pretenses is sufficient where it shows that the money was secured by falsely representing that a tract of forty acres in S. county was subject to homestead entry and that accused could locate the prosecuting witnesses thereon, in view of Rem. Code, §§ 2065, 2066, requiring only a statement that may be understood by a person of common understanding which is insufficient only when it tends to prejudice the substantial rights of the defendant.

SAME—EVIDENCE—SUFFICIENCY. A conviction of obtaining money under false pretenses is sustained where it appears that accused obtained $300 by falsely representing that land pointed out by him was subject to homestead entry, and by inducing the prosecuting witness to enter a contest and make an entry upon other land.

CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESSES. It is not error to refuse a third continuance to obtain the presence of witnesses who were nonresidents of the state and whose attendance was optional and there was no certainty that it could be obtained.

SAME—TRIAL—POLLING JURY—IMPEACHING VERDICT. Where, upon polling the jury, a juror answered "either that or a hung jury," and upon being admonished, answered, "yes," the verdict should be received and cannot be impeached.

SAME—TRIAL—IMPEACHING VERDICT. The verdict of a jury cannot be impeached by a juror's affidavit that she, unknown to the other jurors, arrived at her decision by chance.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 20, 1917, upon a trial and conviction of obtaining money by false pretenses. Affirmed.

Morris & Shipley and *Thomas J. Casey*, for appellant.

Alfred H. Lundin and *Frank P. Helsell*, for respondent.

[1]Reported in 174 Pac. 10.

MOUNT, J.—The appellant was found guilty by a jury upon a charge of obtaining money by means of false pretenses. The trial court pronounced sentence upon the verdict, and this appeal followed.

The appellant contends, first, that the court erred in overruling a demurrer to the information. Omitting the formal parts, the information is as follows:

"He, said Frank Millroy, in the county of King, state of Washington, on the 1st day of September, 1916, did then and there wilfully, unlawfully, falsely, designedly, fraudulently and feloniously pretend and represent to Steve Diemoz and Paul Droz that a certain tract of land of forty acres, consisting of twenty-five acres of upland and fifteen acres of water, near Clear Lake, Skagit county, Washington, the exact legal description of which is to the prosecuting attorney unknown, was subject to homestead entry and that he, said Frank Millroy, could arrange matters so that said Steve Diemoz and Paul Droz could make a homestead entry on said lands, and that he, said Frank Millroy, could locate said Steve Diemoz and Paul Droz on said lands under the homestead laws of the United States; and the said Steve Diemoz and Paul Droz then and there believing the false pretenses and representations so made by said Frank Millroy, and relying thereon, and being then and there deceived thereby, were then and there induced, by reason thereof to deliver, and did then and there deliver, to said Frank Millroy the sum of three hundred dollars ($300) in money, of the value of three hundred dollars ($300) in lawful money of the United States, the property of said Steve Diemoz and Paul Droz; and the said Frank Millroy did then and there wilfully, unlawfully, fraudulently and feloniously receive and obtain said money by means of said false and fraudulent pretenses and representations, with intent then and there to deprive and defraud said Steve Diemoz and Paul Droz thereof.

"Whereas, in truth and in fact, said pretenses and representations then and there so made by said Frank Millroy to said Steve Diemoz and Paul Droz were in all respects utterly false and untrue, in this, that said

land was not then and there subject to homestead entry and said Frank Millroy was not then and there able to arrange matters so that said Steve Diemoz and Paul Droz could make a homestead entry on said lands, and said Frank Millroy was not then and there able to locate the said Steve Diemoz and Paul Droz on said lands under the homestead laws of the United States, as he, said Frank Millroy, then and there well knew."

Appellant contends that this information is insufficient, because it lacks the essentials of accuracy and definiteness; that it does not give the legal description of the land referred to; that the representations are not representations of past or existing facts; and that the representations made relate to matters of public record, and, for that reason, the prosecuting witnesses were not authorized to act thereon. We think there is no merit in any of these contentions. The gist of the information is that the appellant falsely represented that a tract of forty acres of land in Skagit county was subject to homestead entry and that he could locate the prosecuting witnesses thereon; that, in truth and in fact, the representations so made were false and untrue, which the appellant then and there well knew. It appears from the information that the legal description of the particular tract of land was unknown to the prosecuting attorney, but it is alleged that it was near Clear lake, in Skagit county. The statute (Rem. Code, § 2065) provides that an information is sufficient if it can be understood therefrom by a person of common understanding what is intended; and, at § 2066, no information is insufficient "which does not tend to the prejudice of the substantial rights of the defendant upon the merits." We are clearly of the opinion that the information in this case was sufficient to inform the appellant what was intended. *State v. Phelps,* 41 Wash. 470, 84 Pac. 24; *State v. Ryan,* 34 Wash. 597, 76 Pac. 90.

In *State v. Phelps, supra,* we said, in referring to an information charging the crime of obtaining money under false pretenses:

". . . an information, in order to state facts sufficient to constitute a crime, must allege the intent to defraud, the design, the means used by which the fraud was practiced, and must describe the articles, or thing of value obtained. Measured by these tests, it is at once apparent that the information before us does sufficiently allege the intent to defraud, the design, and sufficiently describes the thing of value obtained from the prosecuting witness. The only essential about which there can be any question is the allegation concerning the means used to induce the prosecuting witness to part with his property."

The same is true in this case. The means used in this case to induce the prosecuting witnesses to part with their money was the false representation that a certain tract of land in Skagit county, consisting of twenty-five acres of upland and fifteen acres of water, was subject to homestead entry under the laws of the United States, when the tract pointed out was not subject to entry. So it is clear, we think, that the information states sufficient facts and is sufficiently definite to inform appellant of the particular acts charged against him. It is unnecessary, therefore, to consider whether the representations made were of past or existing facts, or whether the matters represented were matters of public record or not. If such representations were made and relied upon, the offense was complete. *Woodbury v. State,* 69 Ala. 242, 44 Am. Rep. 515; *Jenkins v. State,* 97 Ala. 66, 12 South. 110.

Appellant further contends that the evidence was insufficient to submit to the jury. The evidence on the part of the prosecution shows conclusively that the appellant took the prosecuting witnesses to a piece of land in Skagit county, at or near a lake known as

Beaver lake, and pointed out a stake which he represented was the corner of a forty-acre tract. He pointed out a tract of land bordering on the lake and consisting of about twenty-five acres and stated to them that fifteen acres adjoining the twenty-five acres was covered with water and that this land and water were subject to homestead entry. He explained to them at the time that the land had been theretofore filed upon, and that it would be necessary to institute a contest against the person who had filed upon the land and abandoned it, and then the land would be subject to entry under the laws of the United States. He then took the prosecuting witnesses to the United States land office and entered a contest against the person who had filed upon a certain forty-acre tract of land which was not the land pointed out to the prosecuting witnesses, and a contest was had which resulted favorably to the prosecuting witnesses. They then filed upon the tract of land, the description of which was given by the appellant. When they went to locate upon the land, they learned that the land which was pointed out to them by the appellant was land which had been held for years in private ownership and was not subject to homestead entry. It was shown beyond dispute that the appellant knew the land around this lake was all held in private ownership, except the lake itself, and that the forty acres, description of which was given by the appellant to the prosecuting witnesses, was almost, if not entirely, covered by water. The prosecuting witnesses relied upon the representations made by the appellant, and before they attempted to settle upon the land which was pointed out to them, they paid the appellant $300. If these facts are to be believed, it is plain that the appellant falsely and fraudulently, by means of the representations which he made, obtained the money of the prosecuting wit-

nesses, and was therefore guilty. Upon the whole evidence submitted to the jury, we think it was not only sufficient, but that the jury could have reasonably found no other verdict.

Appellant further argues that the court erred in refusing to grant a continuance when the case was finally called for trial. It appears that the cause was originally set for trial on May 2, 1917. Prior to that date, the appellant moved the court for a continuance upon the ground that two necessary witnesses were absent in Alaska and in Vancouver, B. C. At that time counsel for appellant represented to the court that the witnesses could be in attendance the latter part of May. The case was thereupon continued until the 28th of May. Upon that date, a request for a few days' continuance was made, and it was continued until the 31st day of May, 1917. Thereupon, a further continuance was asked upon the ground that the same two witnesses were not in attendance upon the court. The trial court denied the further continuance and proceeded with the trial of the case. There was no error in denying the motion for further continuance. The witnesses, on account of whose absence a continuance was asked, were nonresidents of the state and it was optional with them whether they would attend. There was no certainty that their attendance could be had. It was, therefore, within the discretion of the trial court to grant or deny a continuance.

It is next argued that the court erred in receiving the verdict of the jury. When the verdict was returned, the jury was polled. In answer to a question asked of each of the jurors whether the verdict was their verdict, one of the jurors answered: "Either that, or a hung jury." When admonished by the court that she should answer directly "Yes" or "No," the juror, in answer to the question: "Is this your verdict

and the verdict of the jury?" said "Yes." The verdict was thereupon received. The answer of the juror to the question of the court was conclusive, and the juror cannot now be heard to say that she did not agree to the verdict. *Bean v. State,* 17 Tex. App. 60; *Hill v. State,* 64 Ga. 453; *Moss v. State,* 152 Ala. 30, 44 South. 598; *Gose v. State,* 6 Tex. App. 121.

Appellant next argues that a new trial should have been granted because of misconduct of the jury. Affidavits of some of the jurors were to the effect that, while one of the jurors assented to the verdict, her assent was brought about by chance. She made an affidavit to the effect that, while she was considering the verdict, and while she had a piece of candy in her hand, she cast the piece of candy to determine whether her vote should be guilty or not guilty, and, upon the result of that cast, she decided that she should vote for a verdict of guilty. It is not claimed that the other jurors knew of this. Whatever the fact may be, it is plain that the verdict of a jury cannot be impeached in this way. After a juror has returned a verdict, he cannot be heard to impeach the verdict because some trifling circumstance like this may have controlled his vote. *State v. Parker,* 25 Wash. 405, 65 Pac. 776; *Maryland Casualty Co. v. Seattle Elec. Co.,* 75 Wash. 430, 134 Pac. 1097; *State v. Lorenzy,* 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B 153.

We find no error in the record, and the judgment must therefore be affirmed.

MAIN, C. J., HOLCOMB, FULLERTON, and CHADWICK, JJ., concur.

[No. 14647. Department Two. July 26, 1918.]

A. L. PATTERSON, *as Commercial Market, Respondent*, v. F. M. JORDAN *et al., Appellants.*[1]

LANDLORD AND TENANT—LEASE — ABROGATION — EVICTION — DAMAGES. An agreement by a tenant, occupying part of a building, that a contractor might commence tearing down the building, and to vacate on a certain date, does not render the landlord or contractor liable for damages as for an eviction, when an unanticipated rain damaged the tenant's goods during the work.

SAME — LEASE — ABROGATION — CONSIDERATION. Under such an agreement where the landlord was preparing for the immediate erection of a new structure for lease to the occupants, and the contractor refused to proceed until all tenants agreed to vacate, the reciprocal surrender of rights constituted a sufficient consideration.

ESTOPPEL—CONTRACTS. A tenant who agreed to abrogate a lease so that the building may be torn down, is estopped to assert want of consideration, after the contractor acted on his promise and had proceeded to take down the building.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered October 17, 1917, upon findings in favor of the plaintiff, in an action in tort, after a trial on the merits to the court. Reversed.

Fogg & Fogg and *Frank D. Nash*, for appellants.

E. D. Hodge, for respondent.

CHADWICK, J.—The appellants, Jordan and wife, are the owners of lots 3, 4, 5 and 6, in block 1108, located on the upper side of Market street, in Tacoma. A building which had been occupied as a skating rink and dance hall had been constructed on these lots. The level of the floor was from ten to fifteen feet above the level of Market street. The ground had been excavated under the building and stalls had been established there and along the sidewalk. These were roofed over and

[1]Reported in 174 Pac. 454.

had been occupied as market places, the whole being known as the City Market of Tacoma. The respondent occupied the corner stall of the market under lease from month to month. In May, 1917, the city of Tacoma ordered the stalls along the sidewalk removed from the street in front of appellant Jordan's property. The result of this was to affect the desirability of the stalls as market places, and we take it that some of the tenants, and possibly the respondent, insisted that a new building be erected. At any rate, the appellant's agent procured the services of architects who prepared a plan for a new building. The plan required the excavation of the ground theretofore occupied by the main structure, and the tearing down of the stalls which had been erected thereunder. The agent negotiated with a contractor to do the excavating. At the time the agent was notified by his principals to have plans prepared, he went to respondent and asked him if he would want a regular notice to get out, or if he could get out in a few days, if they decided to put up a new building. Respondent told the agent that he would want sufficient time to get out and be located. The plans were completed about the 19th of June. The agent and the contractor met at the office of the architect to sign the contract. The agent, however, refused to sign at that time, saying that he would not sign until he had seen the tenants and made it certain that they would be able to get out, it being the then intention and desire of the parties to complete the excavation by the first day of July. The contract for excavating was sublet to appellant Denholm. The agent accordingly interviewed the tenants. All of them agreed to be out by the following Saturday night, June 23d. The testimony of the agent is as follows:

"I went in and saw Mr. Patterson and I told him that as we could not go ahead with the excavation, as

we first intended, by excavating through the center of the lots, as we thought we could do, because the contractor had told us that he could not work to advantage unless he had the whole frontage to work on, as he wanted to work his shovel across the face of the excavation; and I told him that in order for us to go ahead with the contract that it would be necessary for all tenants to vacate, and I had absolutely refused to sign the contract until I was absolutely assured by each of the tenants that they would be out on the 23d, because the building must be torn down by the first of the month in order for the excavation to commence.

"Mr. Patterson says, 'I don't know whether I can make it or not.' Well, I said, 'It is absolutely necessary; I want to know before I sign that contract.' He said, 'Are the other fellows going to be out?' I said, 'Yes, they have all agreed to be out on the 23rd.' He said, 'All right, I will, too.' Just as I was going out I says, 'A week's rent will be refunded to you.' "

The respondent's report of the conversation is "I told him that I would try to do so." On the morning of the 25th of June, respondent informed Denholm and respondent's agent that he would not get out of the building at the time that he had agreed to get out or had thought that he might get out. Denholm was upon the ground and ready to proceed with the work. He asked respondent if he cared if the roof was removed up to his place of business. He says that the respondent said "No, go to it." It does not seem to be seriously denied that respondent agreed that the subcontractor could carry on his work if the roof over his head was not interfered with. At any rate, respondent remained in the building until about the 10th day of July. Denholm, the subcontractor, commenced to tear down the building on June 25th. He entirely removed forty feet at the south end, and by Wednesday evening, June 27th, had torn away the superstructure of the building down to the skating rink floor. The roof over

the part of the building which was over respondent's place of business was not cut away. On the evening of the 27th, it rained and the water accumulating on the maple floor ran back into the north end of the building and seeped through into respondent's stall, damaging his goods to a very considerable extent.

The court below made findings allowing respondent the damage which he claimed to have suffered. The court found that there was no valid agreement made between the parties for a suspension of the lease, and that, for this reason, respondent was entitled to the protection of his lease to the end of his term, or up to the time of his voluntary removal. Counsel for respondent relies upon *Wusthoff v. Schwartz*, 32 Wash. 337, 73 Pac. 407, and *Bancroft v. Godwin*, 41 Wash. 253, 83 Pac. 189. The first case might be in point if it were shown that there was no permission to proceed with the repairs, but in this case we think the testimony preponderates in favor of the appellants. Respondent was willing to vacate and would have done so but for some trouble in procuring carpenters to properly prepare another room which he expected to occupy while the new building was being erected. In other words, the rule and its limitation is noted by Judge Hadley, who wrote the opinion. He says:

"Under the rule . . . the acts of the respondent amounted to an eviction unless those acts were waived by the consent of the appellants."

In the second case, it was charged that the remodeling of the building was done in a careless and unskillful manner. In the case at bar, respondent is not in a position to urge that the work was negligent or unskillfully done, for he had consented that the subcontractor be not interrupted in his work, but might remove that part of the building which was south of the room occupied by him. The contractor was engaged

in the performance of this work when the rains came. The rains were not anticipated by either party, and if they had been, the law would charge, under the record before us, the burden of anticipation to the respondent and appellants in equal degree. If the work of removal of the entire structure had been completed before it rained, that is, had the floor been removed along with the superstructure up to or near the line of respondent's stall, no damage would have resulted; for the damage did not come from the rain beating directly through the roof as respondent inferentially alleges in his complaint, but from the water accumulating on the floor of the building, which had been left exposed for many feet to the south of his south line.

Where parties have agreed that a certain thing shall be done, we do not understand that there is any rule of law that will make the one party an insurer against the action of the elements; nor do we think that the agreement to move, or the agreement to permit the razing of the building up to the part that was occupied by respondent, was void by the want of consideration. The agreement of respondent to get out on the 23d so that the work might go on, or as soon thereafter as it was possible for him to do so, which is the effect of his answer that he would "try to do so," he knowing of the intention of appellants Jordans' agent to sign a contract for the excavation and that he was preparing for the immediate erection of a new structure, was sufficient to sustain the contract to change the lease from a tenancy from month to month to a term expiring either on the 23d of June or from day to day thereafter. As said in *Engels v. Mitchell,* 30 Minn. 122, 14 N. W. 510:

"This was an agreement, in effect, that the tenancy should terminate on the day named, and, if valid, it changed the tenancy from one at will to one for a fixed

term, to end on that day. The only objection made to its validity is want of consideration to sustain it. At the time it was made, neither party could, without the consent of the other, terminate the tenancy before July 15th; could terminate it at that time only by giving notice required by statute. By the agreement each party yielded or gave up the right to hold the other for any time beyond the 15th of June, and this reciprocal surrender of rights constituted a consideration on each side for the agreement."

Or, on the other hand, if it be said that there is no consideration sufficient to make a valid agreement to abrogate the lease, we think respondent is estopped to raise the question; for it is proved beyond the peradventure of a doubt that the subcontractor, Denholm, who is joined as a party in this action, and who, as we must assume, was not wilfully putting himself to the liability of a damage suit, did not undertake the removal of any part of the building until he thought at least that he had respondent's consent so to do.

"Where a third person is employed by the landlord with the consent of the tenant to make repairs or improvements to the demised premises, he will be liable to the tenant for injuries to his property on the premises resulting from negligence in doing the work." 16 R. C. L., p. 677, § 163.

Having, as we find from the testimony, consented to the work proceeding pending his removal, respondent's cause of action, if any, was for the negligent performance of the work. This he has neither pleaded nor proved. His complaint is drawn upon the theory that he was disturbed in his possession in violation of the term of his lease, contenting himself to stand upon the proposition, and as the lower court found, that "there was no valid agreement for the vacation of the premises occupied to the 23d day of June or at any particular or specified date."

We find the evidence to preponderate in favor of the appellants upon the issue of consent, and that there was an agreement valid and sufficient in law for the abrogation of the lease from month to month.

The judgment of the lower court is reversed, with instructions to enter a judgment of dismissal.

MAIN, C. J., HOLCOMB, and MOUNT, JJ., concur.

[No. 14703. Department Two. July 26, 1918.]

SIMON PIANO COMPANY, *Appellant*, v. H. B. FAIRFIELD, *Respondent*.[1]

NUISANCE—ABATEMENT—ACTION — PARTIES — TITLE UNDER CONDITIONAL SALES CONTRACT. The "red light" or abatement law, being penal in its nature, will not be construed to authorize the seizure and sale of personal property held under a conditional sales contract, in the absence of a showing that the owner was charged with knowledge of the use of its property and given an opportunity to be heard in defense of the use to which it was put; since Rem. Code, §§ 3670, 3671, relating to conditional sales are not impliedly repealed by that act.

JUDGMENT—PERSONS BOUND—PERSONS NOT BOUND—INVOLUNTARY APPEARANCE—ESTOPPEL. An appearance in response to a rule to show cause why a person should not be found guilty of contempt in taking possession of property seized under the abatement statute, and a return of the property, such party not having been served and having no notice of the restraining order, is not a voluntary submission to the decree in abatement, and does not estop the party from setting up want of jurisdiction.

CONTEMPT—JURISDICTION — JUDGMENT — COLLATERAL ATTACK. In contempt proceedings for interfering with property seized under the abatement statute, while lack of jurisdiction to enter the order of abatement may be raised collaterally, it will not be tried out as an abstract question; and the court having jurisdiction of the subject-matter, the order must be absolutely void to work a purging of the contempt; since mere irregular or improvident exercise of jurisdiction cannot avail one who laid claims to property in a collateral proceeding.

[1]Reported in 174 Pac. 457.

NUISANCE—ABATEMENT—SEIZURE OF PROPERTY—PARTIES — NOTICE. Where the vendor of property in a conditional sales contract was not made a party to abatement proceedings under the "red light" law, or given any notice of the proceedings, he is not bound by the decree and may recover the property, as if it were property sold *coram non judice*.

EXECUTION — WRONGFUL SEIZURE OF PROPERTY — RIGHTS OF THIRD PERSONS—CLAIM AND DELIVERY. The vendor of property in a conditional sales contract who was not made a party to abatement proceedings under the "red light" law may replevin the same without making claim to the sheriff as for property wrongfully levied upon under Rem. Code, § 573; since the same is not mandatory, and merely gives the claimant to property levied upon a choice of remedies.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered November 2, 1917, upon findings in favor of the defendant, in an action of replevin, tried to the court. Reversed.

A. E. Gallagher, for appellant.

D. R. Glasgow, for respondent.

CHADWICK, J.—Appellant brought this action to recover possession of a piano, alleged to be of the value of $260. The appellant sold the piano to one Bonnie Raymond on October 7, 1914, under a conditional sales contract. An action was begun in July, 1915, against Bonnie Raymond and the premises then occupied by her under the abatement law, ch. 127, Laws of 1913, p. 391 (Rem. Code, § 946-1 *et seq.*).

Appellant was not made a party to the action. The court found the place to be a nuisance, and directed that it be closed and that all personal property therein contained be seized and sold to satisfy the costs of the proceeding and a fine of $300, which had been assessed against the defendants. At the inception of the proceedings, the court issued a restraining order commanding and prohibiting all persons from in any way interfering with the property. Appellant did not know

of the restraining order until the 12th day of August, the day upon which a final decree was rendered. On August 11th, Bonnie Raymond being in default under her conditional sales contract, one Emil Simon, president of appellant company, took possession of the piano. On the next day, August 12th, the prosecuting attorney filed an information against Simon and caused him to be brought before the court to answer for contempt, it being charged that he had removed the piano in defiance of the order of the court. Simon defended upon the ground that the court had not obtained jurisdiction over the property of the appellant or of the appellant. The court having ruled to the contrary, Simon returned the piano to the sheriff, who afterwards sold it under the decree which had been previously rendered. At the sale, the piano was purchased by the defendant. An agent of appellant stood by and asserted its interest in the property. After a demand and refusal on the part of the respondent to deliver the property, this action was brought to recover possession, or in the event that possession could not be had, for the value of the piano.

While it may well be questioned whether the court can impound and sell property in an abatement proceeding, when it is held by a defendant under a conditional sales contract, we shall, for the purposes of this case, assume that it may be so; but so assuming, it does not follow that the court obtained jurisdiction of the person or the property of the appellant. The statute, Rem. Code, §§ 3670, 3671, are not impliedly repealed by the abatement law. The right of property under a conditional sales contract is as secure as it was before the passage of that law, and granting that property which offends may be seized and sold or destroyed, the court may not dispose of it or work its destruction without giving the owner his day in court.

We think our holding is well within the principle declared in *State ex rel. Kern v. Emerson,* 90 Wash. 565, 155 Pac. 579, L. R. A. 1916F 325; wherefore, in the absence of a showing that the appellant was charged with a knowledge of the use of its property and given an opportunity to be heard in defense of the use to which it was put—the abatement law being penal in its nature —we think it would be carrying the law beyond its legitimate inferences or its fair intentions to hold that an owner is bound by a proceeding to which it has not been made a party.

But it is urged that the appearance of Emil Simon in response to the rule to show cause why he should not be fined as for contempt was a sufficient appearance in the action, and that his return of the property was a voluntary submission to the decree of the court. The trial judge made written opinion, saying:

"The plaintiff now seeks to recover the piano or its value on the ground that the sale was void in that the court had no jurisdiction to order it. However, I think plaintiff is estopped by his conduct from setting up want of jurisdiction. It knew before sale that the court was undertaking to exercise jurisdiction over the piano. It acquiesced in the validity of the decree by returning the piano upon Mr. Simon being charged with contempt.

"In 16 Cyc., at page 795, it is said: 'Where a party with knowledge of the facts assents to or participates in judicial proceedings, without objection, he is bound by such proceedings as against one who has been misled by his conduct.' The following cases from our supreme court bear out this rule: *Daly v. Everett Pulp & Paper Co.,* 31 Wash. 252, 71 Pac. 1014; *Bank of California v. Puget Sound Loan, Trust & Banking Co.,* 20 Wash. 636, 56 Pac. 395; *Masterson v. Union Bank & Trust Co.,* 86 Wash. 560, 150 Pac. 1126; *Schroeder v. Hotel Commercial Co.,* 84 Wash. 685, 147 Pac. 417; *Douthitt v. MacCulsky,* 11 Wash. 601, 40 Pac. 186.

"The plaintiff having, through the actual knowledge

of its manager, notice that the court was assuming jurisdiction over the piano, was obliged to either establish its ownership by defending its right to it as a defense in the contempt proceeding, or else lay claim to it in the hands of the sheriff under § 573 *et seq.*, of R. & B. Codes & Statutes.

"Judgment for defendant."

But we think the burden put upon the appellant by the court is greater than the law demands. The appearance—granting that the appearance of the president of appellant would bind appellant—under the coersive process of the law was neither an assent to nor a participation in the main case. In all of the cases cited by respondent, the appearance was made before final decree and while the proceeding was still judicial in the sense that judgment or decree of the court was unpronounced and subject to further proceedings so that the right of the appearing party could have been granted or denied in the judgment or decree.

Nor should the appellant be held to the obligation "to either establish its ownership by defending its right to it [the piano] as a defense in the contempt proceeding, or else lay claim to it in the hands of the sheriff under § 573 *et seq.*, of R. & B. Codes & Statutes."

The question of ownership was not the issue, and before the court could hold the appellant to strict proof of ownership it must have reopened the principal case and invited an issue upon the civil side of the court. The offense charged was the violation of a solemn decree of the court. The only defense available to the defendant Simon was that the court did not have jurisdiction to render a valid decree. For it seems to be the rule that the question of the validity of an original order going to the jurisdiction of the court may be raised in a collateral proceeding for contempt. 6 R. C. L. 506; *State ex rel. Publishing Co. v. Milligan*, 3

Wash. 144, 28 Pac. 369; *State ex rel. Evans v. Winder*, 14 Wash. 114, 44 Pac. 125.

Upon the issue of jurisdiction, the court properly held against the agent Simon. When that question is raised collaterally, the court will not try out the issue as if it were raised directly. It will treat it as an abstract proposition rather than as a concrete question. The decree must be absolutely void to work in and of itself a purging of contempt. *State ex rel. Publishing Co. v. Milligan, State ex rel. Evans v. Winder, supra; Clark v. Burke*, 163 Ill. 334, 45 N. E. 235.

"The lack of jurisdiction must be such as is manifest in the inception of the proceeding, and not that which develops through the hearing and determination of the cause; hence it is no bar to the conclusiveness and sentence for contempt that the court was investigating a matter over which it was finally ascertained to have no jurisdiction." 13 C. J. 14.

See, also, *United States v. Shipp*, 203 U. S. 563.

The action of abatement being *in rem*, and the court having jurisdiction to seize all property in the possession of the defendant, Bonnie Raymond, it follows that the mere irregular or improvident exercise of that jurisdiction would not avail one who laid claim to the property in a collateral proceeding.

"A defendant cannot refuse to obey an injunction, however improvidently or erroneously granted, but he is bound, at his peril, to obey it while it remains in force." *Barnes & Co. v. Chicago Typographical Union No. 16*, 232 Ill. 402, 83 N. E. 932, 122 Am. St. 129, 14 L. R. A. (N. S.) 1150.

Which is no more than to say that, upon inquiry collateral to a proceeding *in rem*, a court will not seek further than to ascertain whether it has jurisdiction of the subject-matter of the action for:

"If it were conceded that there was a defect of parties, that fact would not have deprived the court of

jurisdiction to have heard and decided the questions before it and its order granting the injunction would not have been void, and the respondents could not have justified their acts in violation of the injunction on the ground that there was a defect of parties to the bill." *Franklin Union No. 4 v. People,* 220 Ill. 355, 77 N. E. 176, 110 Am. St. 248, 4 L. R. A. (N. S.) 1001.

Appellant neither appeared in nor answered to the merit of the original case. It is not bound by the decree and may recover its property as if it were property sold *coram non judice.*

"When a sheriff sells chattels under an execution, he sells, not the absolute title and property in such chattels, but the property of the execution defendant therein." Murfree, Sheriffs (2d ed.), § 552; *Northern Pac. R. Co. v. Smith,* 68 Wash. 269, 122 Pac. 1057.

We find no merit in the suggestion that appellant was bound to make claim to the sheriff under Rem. Code, § 573. The statutory proceeding is not mandatory in the sense that a failure to proceed under it will estop an owner to assert his common law remedy, or to maintain an action under the claim and delivery statute.

"In other words, the statute [§ 573] was intended to give a claimant of property levied upon or attached an additional remedy for its recovery. It does not supersede the common law remedies. The claimant still has a choice of remedies; he may pursue the procedure pointed out by the statute, or he may maintain replevin to recover the property in specie, or trover for its conversion." *Carpenter v. Barry,* 26 Wash. 255, 66 Pac. 393.

The judgment of the lower court is reversed with directions to enter a judgment in favor of the appellant.

MAIN, C. J., HOLCOMB, MACKINTOSH, and MOUNT, JJ., concur.

[No. 14717. Department Two. July 26, 1918.]

S. P. WESTFIELD, *Respondent*, v. CHARLES MARBLE *et al.*, *Appellants*.[1]

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence affected by the weight of the evidence and credibility of the witnesses will be sustained on appeal unless it can be said that the evidence preponderates the other way.

Appeal from a judgment of the superior court for King county, French, J., entered November 12, 1917, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

George B. Cole and *John Wesley Dolby*, for appellants.

S. H. Kelleran, for respondent.

HOLCOMB, J.—Respondent made an oral agreement to procure a purchaser for corporate stock belonging to appellants. On March 10, 1917, respondent procured one Perry who made a written contract with appellants to exchange a certain amount of real estate for the corporate stock. There is no dispute as to the amount of $1,000 commission to be paid. Respondent claimed and recovered in the trial court on the theory that the commission was due when he got a buyer. Appellants concede that respondent had procured a buyer, but claim that $200 of the commission was to be paid when all the deeds from Perry to appellants were delivered, and the balance of $800 was to be paid when respondent either sold or secured a loan on some of the property to be conveyed by Perry to appellants. Perry having failed to deliver deeds as per centract, suit was begun by appellants against him for specific performance. It is admitted that $50 of the commission

[1]Reported in 173 Pac. 1090.

has been paid to the respondent. The court made findings and entered judgment in favor of respondent for $950.

The controlling question is whether the evidence preponderates in favor of respondent's or appellants' version of the contract. The evidence is somewhat conflicting, but the question of the weight of the evidence and credibility of the witnesses is within the province of the trial court, who is in a better position to determine it than we are, unless we can say from the typewritten pages that it preponderates the other way, which here we cannot.

The judgment is in accord with the findings, and it will be affirmed.

MAIN, C. J., MOUNT, and MACKINTOSH, JJ., concur.

[No. 14785. Department Two. July 26, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. DR. J. B. RAUB, *Appellant*.[1]

INTOXICATING LIQUORS—OFFENSES—ILLEGAL PRESCRIPTIONS — GOOD FAITH—EVIDENCE OF OTHER CRIMES. In a prosecution for illegally prescribing whiskey to a patient, within such time as obviously called for more than was needed, the question of good faith being an issue under the statute, evidence of the issuance of fifty-six other prescriptions to other patients at or about the same time is admissible and is not objectionable as evidence of other crimes.

SAME — ILLEGAL PRESCRIPTIONS — EVIDENCE — SUFFICIENCY. In a prosecution for an illegal prescription of whiskey "without good reason to believe" that the patient was sick or required it, it is not necessary to prove the physical condition of the patient or that she did not in fact need the remedy, where it was shown that accused had theretofore prescribed whiskey for such patient in quantities which would have more than met the "directions" at the time in question.

CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL. A remark of the prosecuting attorney in argument that the accused "has not

[1]Reported in 173 Pac. 1094.

testified," does not warrant a reversal, where, upon objection, the court directed the jury to disregard it and instructed the jury that no inference of guilt should be drawn from accused's failure to testify.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered December 15, 1917, upon a trial and conviction of violating the prohibition law. Affirmed.

John M. Gleeson and *Crandell, Williams & Crandell,* for appellant.

John B. White and *Joseph B. Lindsley,* for respondent.

CHADWICK, J.—Information was filed under Rem. Code, § 6262-1 *et seq.* The trial judge permitted the introduction of testimony showing the giving of some fifty-six other prescriptions than those given to the party named in the information, and at about the same time. Appellant had issued to his patient five prescriptions between the 26th day of August, 1917, and September 11, 1917, each calling for one quart of whiskey. On each prescription, the patient is directed to take one ounce of the remedy in water three times a day. As these prescriptions obviously call for a greater quantity of liquor than was necessary to meet the needs of the patient if "taken as directed" the good faith of the physician, the issue in this class of cases, was clearly tendered by the state, and to further sustain the issue the other prescriptions were offered.

"The rule is that, in cases of this character, such evidence is competent. The real issue in such a case is whether the prescription was given in good faith, and as bearing upon this question, the number of prescriptions given by the accused, within a specified time, for intoxicating liquor, to various persons, as found on the file of the druggist, in whose store the appellant kept

his office, is competent." *Seattle v. Hewetson,* 95 Wash. 612, 164 Pac. 234.

See, also, *Everett v. Cowles,* 97 Wash. 396, 166 Pac. 786.

It is urged that this procedure is violative of the rule that proof of crimes independent and in no way related to the crime charged cannot be established to prove a specific offense. It would be so if the crime charged rested alone in the doing of the act charged. But the gravamen of the offense is not in the doing of the deed, but in the faith in which it was done. The rule seems to have grown out of the necessities of the statute, for the act itself is presumptively a lawful act sanctioned by statute. It is rendered unlawful when, and only when, the writer of the prescription abuses the confidence that is reposed in him and by the injection of the subtle quality of bad faith thwarts the police power of the state. From the nature of things, good or bad faith can only be proved by resort to circumstances and side lights. If it were otherwise —if the mere giving of a prescription or a number of prescriptions by a licensed physician would bar further inquiry—the law would be emasculated of its purpose. It is not going beyond the range of judicial vision to say that liquor has not always been regarded as a cure-all or touchstone of health, but that it has grown in popular favor as a remedy as the chance of procuring it has grown remote; and although a physician who prescribes it may be imposed upon at times, a general dispensation of the remedy at or about the time charged is sufficient to put him to the defense of his good intention before a jury of his countrymen.

It is complained that no testimony was offered to show the physical condition of the patient, or that she did not in fact need the remedy, the charge being

that appellant prescribed liquor "without good reason to believe that she was at the time actually sick or that said intoxicant was required for medicine." But we think the showing that appellant had theretofore prescribed four quarts of liquor which would have met the "directions" for a time far beyond the time when the prescription upon which the charge is made (September 11th) was written, was a sufficient circumstance to go to the jury, and being unmet in any way, is enough to sustain the verdict.

Finally, it is complained that a new trial should be granted on the ground of misconduct of counsel. In his argument to the jury, Mr. Lindsley said:

"I think you could keep pretty full, pretty much intoxicated on five quarts of whiskey in sixteen days. And *Dr. Raub knew she did not need it for medicine.* The record he makes himself here on these prescription blanks speaks for him. *He has not testified.*"

The italicized words are complained of as comment on the fact that appellant had not taken the stand as a witness in his own behalf. *State v. Smokalem,* 37 Wash. 91, 79 Pac. 603. When objection was made, counsel for defendant moved that the jury be discharged. Whereupon the following colloquy:

"The Court: Ladies and gentlemen of the jury— Mr. Lindsley: Just a moment, your honor, I have a right to say to this jury that he is not called upon to testify. The Court: Wait a minute. Ladies and gentlemen of the jury, Mr. Lindsley had no right to comment upon the failure of Dr. Raub to take the stand and testify. Mr. Lindsley: I do not intend to. The Court: And you will disregard the remark completely. I will deny the motion at this time."

In addition to the specific direction to disregard the objectionable language, the court gave the usual instruction that no inference of guilt should be drawn

from the fact that appellant had failed to take the stand as a witness in his own behalf.

The conduct of counsel is not to be commended, but we think the fault was covered and the error, if any, was cured within the rule of our later decisions. *State v. Johnson, ante* p. 59, 173 Pac. 723.

Affirmed.

MAIN, C. J., HOLCOMB, MOUNT, and MACKINTOSH, JJ., concur.

[No. 14682. Department One. July 29, 1918.]

ROBERT HANSON, *Respondent,* v. MOSES INVESTMENT COMPANY, *Appellant.*[1]

BILLS AND NOTES—PAYMENT—EVIDENCE—SUFFICIENCY. Oral evidence of the payment of a note by checks is insufficient, where it appears that the note was not surrendered or demanded, no written acknowledgment of payment or intent to pay was made, the note was then held as collateral by a bank, to the knowledge of the parties, and one of the payors had admitted that it was still a binding obligation of the maker.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 26, 1917, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

C. H. Winders (*Joseph C. Sherman,* of counsel), for appellant.

Fred C. Brown, for respondent.

PARKER, J.—The plaintiff, Hanson, seeks recovery upon a demand promissory note, executed and delivered by the defendant, Moses Investment Company, to Alton N. Gregory, who transferred it to the German-American Mercantile Bank, of Seattle, which bank in

[1]Reported in 174 Pac. 25.

turn transferred it to the plaintiff. Trial in the superior court for King county, sitting without a jury, resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed to this court. The only defense made by appellant is that of payment.

On October 1, 1914, appellant was indebted to Gregory in the sum of $1,000. This was the balance due upon a previous larger indebtedness which had existed for a considerable time. On that day, appellant executed and delivered to Gregory the note in question. While the note was payable upon demand, as expressed upon its face, it is apparent from the circumstances under which it was given that the parties did not contemplate that demand for its payment would be made for some considerable time. Very soon after the execution of the note, it was transferred by Gregory to the German-American Mercantile Bank as collateral security to an indebtedness of $2,500, owing by him to the bank. Appellant claims to have discharged the indebtedness evidenced by the note, on November 30, 1914, by payment to Gregory; though the note was not then delivered by Gregory to appellant, at which time it was held by the bank as collateral security to the unpaid debt of $2,500 due from Gregory to the bank, which fact was then well known to appellant. In March, 1915, Gregory's indebtedness to the bank remaining unpaid, certain agreements were then entered into, to which the bank was a party, resulting in the taking up of the indebtedness of Gregory to the bank by respondent Hanson, and the transfer by the bank of its indebtedness due from Gregory, including the collateral thereto, to wit, this note and certain shares of stock.

The trial court found that no part of the note had been paid. This finding we understand to mean that

the note remains wholly unpaid, even as to Gregory, the original payee. The evidence relied upon in appellant's behalf to support its claim of payment is, in substance, as follows: The two Moses brothers, who had the entire management of appellant's corporation business, testified in substance that, on November 30, 1914, Gregory offered to discount the note $50 if appellant would then pay the indebtedness evidenced thereby; that, to enable appellant to take advantage of this offer, it borrowed $1,000 from a Seattle firm, and from the money so acquired paid out $950, as directed by Gregory, in payment of his indebtedness to the bank. In connection with this oral evidence, there were introduced, in appellant's behalf, a note for $1,000 executed by the appellant to the Seattle firm, on November 30, 1914, and also four checks, aggregating $950, issued by one of the Moses brothers against his private bank account, which he testified were issued in payment of appellant's note here sued upon, as directed by Gregory. One of these checks for $101 was issued to the other Moses brother, one for $200 was issued to appellant Moses Investment Company, and the two others were issued to Gregory. As already noticed, the note was not surrendered to appellant by Gregory; indeed, it could not be, as it was then held by the bank as collateral to Gregory's debt owing to the bank. Nor did the Moses brothers, or any one for them, demand or receive any written acknowledgment of any kind evidencing the fact that the transaction testified to by them was intended as a payment of appellant's debt evidenced by this note. This is, in substance, the whole of the showing made in appellant's behalf in support of its claim of payment of the debt evidenced by the note here sued upon. Gregory was not produced at the trial as a witness. Thus it appears that the claimed payment of this note rests,

in its last analysis, upon the oral testimony of the Moses brothers, since the documentary evidence produced in appellant's behalf is not worthy of serious consideration apart from their testimony.

The facts tending to show that the indebtedness evidenced by the note was not paid as claimed by the Moses brothers, are the following: The note was not surrendered and we think that its surrender at the time of the claimed payment was not even demanded in appellant's behalf. The note was then in the possession of the bank as collateral to the indebtedness owing by Gregory to the bank, which fact was known to the Moses brothers and to appellant. No written acknowledgment of any kind evidencing the payment of the note was demanded by, or given to, appellant, or any one for it. It was testified in respondent's behalf, in substance, that at least one of the Moses brothers had admitted, after respondent became the holder of the note, that the note was a legal, binding obligation of appellant, though he protested that appellant was not morally bound to pay the debt evidenced thereby. This, it may be conceded, was not a binding admission upon appellant as to the payment of the note, but it does bear upon the credibility of the testimony of the Moses brothers touching the payment of the note as claimed by them.

This is substantially all we have in the record bearing upon the question of the payment of the note as claimed by the Moses brothers. In its last analysis, the question becomes one of fact and credibility of the testimony of the Moses brothers; and we think the trial court, in view of all the circumstances, was not required to believe that the indebtedness evidenced by the note was paid as claimed by them. Manifestly, the burden of so showing was upon them, and we think that burden has not been sustained. We are, in any

event, convinced that we should not disturb the trial court's findings upon that question.

Some contention is made in appellant's behalf upon the theory that the bank and respondent were neither of them holders in due course; and also upon the theory that the other collateral should have been first exhausted in satisfaction of Gregory's debt to the bank, before resorting to recovery upon this note. While the trial court seems to have been of the opinion that these contentions could not be sustained, we need not notice them here, since we conclude that the judgment must be affirmed upon the theory that the note was not paid even as to Gregory's right to recover thereon; and respondent's rights were, in any event, equal to those of Gregory.

The judgment is affirmed.

MAIN, C. J., TOLMAN, and MITCHELL, JJ., concur.

[No. 14728. Department One. July 29, 1918.]

C. J. CASSUTT *et al.*, *Appellants*, v. MILLER COMPANY, *Respondent*, A. C. PETRIDGE, *Defendant*.[1]

PARTNERSHIP—CONTRACT—EVIDENCE—QUESTION FOR JURY. In an action against a company in the automobile business and an individual demonstrating a car, for personal injuries sustained through negligent driving, there was sufficient evidence that the defendants were partners in the operation of the car, where it appears that the company contributed to the enterprise by furnishing a place of business and advertising and printed matter, and the other contributed his time and personal and other expenses, the profits from the sale of cars being divided.

TRIAL—MOTION FOR JUDGMENT—NEW TRIAL. Where one of two defendants jointly liable had been improperly dismissed, upon verdict against the other, there cannot be a judgment against such defendant without verdict, but only a new trial.

[1]Reported in 174 Pac. 433.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 19, 1917, in favor of the defendant, upon granting a nonsuit, in an action in tort, after a trial to a jury. Reversed.

Elias A. Wright and *Sam A. Wright,* for appellants.
George C. Congdon, for respondent.

MITCHELL, J.—This action was instituted by appellants, husband and wife, to recover for personal injuries to Mrs. Cassutt and damages to their automobile, as the result of an automobile collision caused by the alleged negligence of George W. Miller Company, a corporation, respondent, and A. C. Petridge, defendant. A jury was impaneled in the cause, and, at the conclusion of all the testimony, the court granted a nonsuit in favor of respondent. There was a verdict and judgment against defendant Petridge. Cassutt and wife appeal.

Appellants contend, and respondent agrees, that the main question to be considered here is the propriety of the nonsuit, narrowed to the inquiry if the relations between respondent and Petridge were such as to make them jointly liable. The claim of appellants, in their complaint and in all other ways, is that respondent and Petridge are jointly liable, although Petridge was driving the car at the time of the collision, respondent not being present. Respondent claims Petridge was engaged in an independent business. The full ruling of the court on the motion for the nonsuit was as follows:

"In the matter of a contract a person might be bound to an apparent relationship existing between the parties, but, in cases of this character, a different rule applies, and we have a right to go into the real reason. It appears to me, from the testimony in this case, that this was an independent business that Mr.

Petridge was engaged in, and he had full supervision of it, and was not in the partnership business. I will dismiss the case as to George W. Miller Co."

Thus, it appears that respondent was dismissed from the case for the sole reason expressed.

For the purposes of the case, as it stands here, there is evidence that the car driven by Petridge at the time of the accident belonged to Jack Lannon who called up George W. Miller Company on the phone and told the company to send some one—that he had a car for sale. Complying, Petridge came and got the car, taking a "sale agreement" signed by Lannon on a regular business form used by respondent, the agreement stating, *inter alia:*

"In consideration of the services to be performed by the George W. Miller Co. in endeavoring to effect a sale of the Lozier motor car (No. ....) I do hereby give and grant the said George W. Miller Co. . . . the right to sell the said motor car . . .

"I also grant the George W. Miller Co. the privilege of demonstrating said car whenever, according to their best judgment, it would have a tendency to further said sale, etc."

Respondent has a place of business consisting of several departments, as testified to by its present secretary-treasurer, George W. Miller, as follows:

"Mr. Petridge at that time was renting space from me, and selling second-hand automobiles. I have a separate kind of business up there. I wreck automobiles for their parts, and I rented some of my space up there to Mr. Petridge so that he could sell cars out of my room, building, over our name. The agreement was that for the space he had in there he was to pay us half of the profit. . . . Mr. Petridge paid his own expenses up there, and, for half the profits he was making,—he was to give us half of the profits."

On cross-examination, Mr. Miller further testified as follows:

"Q. The expenses Mr. Petridge paid, he paid the expenses, and then the profits over and above that were divided between your company and Mr. Petridge? A. That is the agreement we had, yes, sir. Q. In other words, whatever the profit was over and above the expenses in the business, he turned it over to the company? A. He turned in half of it. Q. The rent item, of course, was all figured in the expense? A. No; we didn't charge him any rent. Q. I thought you said you charged him rent? A. No; the profits were to offset the rent. Q. Then he didn't have any rent to pay? A. No; without he made profits."

And again, as to the sale contract being in the name of the corporation, Mr. Miller said:

"Q. Under these contracts you controlled the disposition of this car, Mr. Miller, your company? A. I would not say that we did. I suppose we could have controlled it, but I left that all entirely to Mr. Petridge's hands. He was running that department. Q. You left it to him, because he was running that department? A. Yes."

W. H. Sanders, who was secretary for the corporation at the time the Lannon car was placed there under the sale agreement, testified:

"Q. Do you know what the arrangement was with Mr. Petridge and George W. Miller Co. on those cars that came in for sale? A. Yes, sir, I know about that. Q. What was it? A. Mr. Petridge was to handle that part of that department, and make all sales, handle the cars, and divide the profits with the firm. . . . Q. What did Mr. Petridge do with those cars? Did he have charge of that department, and drive those cars when he saw fit? A. He demonstrated the cars, yes, sir. Q. He had charge of them, and did as he saw fit, sold them and divided the profits? A. He had the disposition of the sale of them, and demonstration of the cars. . . . Q. Did he pay his own expenses, or did George W. Miller Co. pay his expenses? A. He paid his own expenses, yes sir. That came out of the profits of the sale, yes, sir."

Defendant Petridge, referring to the sale agreement, said:

"Q. Why did you make it in the George W. Miller Co.'s name rather than your own? A. We were doing it for the publicity of George W. Miller Co. It was the advertising of George W. Miller Co. I didn't have any right to use my name on it as long as I was with the Miller outfit up there."

And referring to his arrangements with respondent, the same witness said:

"Q. Now there has been some testimony here as to your connection with the George W. Miller Co.; kindly tell the jury what that connection is? A. I made arrangements with Mr. Miller to rent space off of him by bringing my cars, whatever cars I got, and selling them there, and using his name and advertising, and dividing the profits I made on the cars. Q. Who were paying the expenses of your venture? A. I was paying all expenses, and everything. Q. Was there any rental for the space, or was the rental supposed to come from the profits? A. No. The only rental was paid out of what profits I made on the sale of cars. If I didn't sell any cars, there wasn't any rental."

Counsel discuss the subject of partnership and somewhat provoke us to define it. This we refrain from attempting, abstractly, for a definition which seeks to accurately include and exclude is fraught with risk, and its complete accomplishment most elusive of power to express. Besides, there is no occasion for such attempt here, since respondent bore a part of the burden of the business by furnishing the place at which it was transacted and the advertising and printed matter used in it, while defendant Petridge contributed his time and personal and other expenses—the profits being divided. It is quite sufficient to observe that one who thus contributes to a business with another for the purpose of procuring a portion of anticipated profits may not be heard to claim a want of liability

growing out of that venture, so far as the relations with that other are concerned. The case was one for the jury.

Upon return of the verdict against Petridge, appellants moved for judgment against respondent also, to whom, as already seen, nonsuit had been granted. This motion was, before judgment, properly denied. Appellants' idea is that, since there was a finding against Petridge, and because the evidence showed respondent was jointly liable with Petridge, therefore the court should give judgment against respondent also. Such proposed course overlooks the fact that, whatever impression appellants entertained as to proof of liability of respondent, the court had already decided it was insufficient to hold respondent, thus presenting a situation, in this case, wherein appellants were limited and relegated to a motion for a new trial, which was subsequently presented without success. The trial court properly held there should be no judgment against respondent in the absence of a verdict against it, to be arrived at only after the jury had heard respondent.

Reversed, and new trial ordered as to respondent.

MAIN, C. J., PARKER, TOLMAN, and FULLERTON, JJ., concur.

[No. 14789. Department One. July 29, 1918.]

J. M. RESER *et al.*, *Appellants*, v. OTTO LABUDE *et al.*, *Respondents*.[1]

JURY—RIGHT TO JURY TRIAL—EQUITY. An action to rescind and cancel an exchange of land being of equitable cognizance, and a claim for damages merely incidental, it is not an abuse of discretion to refuse a jury trial, since the verdict would be merely advisory.

CONTINUANCE—GROUNDS—WANT OF PREPARATION. It is not an abuse of discretion to refuse a second continuance where, upon plaintiffs' first application, conditions were imposed and plaintiffs, on the day set, refused to comply with the conditions, expecting the case would be dismissed, and were therefore not prepared for trial when the adversary waived the conditions; it further appearing that some of the witnesses were in the city and most of them in the county and opportunity was offered to subpoena them.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered June 27, 1917, dismissing an action in equity, upon plaintiffs' failure to prosecute. Affirmed.

J. W. Brooks, for appellants.

Sharpstein, Smith & Sharpstein and *E. L. Casey*, for respondents.

TOLMAN, J.—This is an action brought to rescind an exchange of lands, to set aside and cancel the deeds executed in consummating the exchange, to cancel and set aside a mortgage given by the appellants in the transaction, and to recover incidental damages, all on the ground of misrepresentation and fraud.

A demand for a jury trial was made, which was refused, and the cause was set for trial before the court for the 19th day of June, 1917. Thereafter the appellants made an application for a continuance, upon the

[1]Reported in 173 Pac. 1093.

ground that counsel would be required to be in the state of North Dakota on June 17th, and that the appellant J. M. Reser was engaged in planting wheat in Canada, and could not return for the trial at the time set without greatly sacrificing or endangering his crop in Canada. Whereupon the court made an order continuing the case to June 27, 1917,

"Upon condition, however, that the plaintiffs shall have no right to proceed in said cause and that it shall be a condition of their right to further proceed herein that they shall pay to the defendants or to the clerk of the court for their benefit the per diem fees and the mileage of all of the witnesses of the defendants now in attendance upon this trial, and in addition thereto the sum of $50, and that unless the same shall be paid on or before said 27th day of June, 1917, the plaintiffs shall have no right to proceed further with this cause."

The cause was called for trial on June 27th, whereupon counsel for respondents objected to the cause proceeding to trial because "the plaintiffs had not complied with the order of continuance made in said cause on the 17th day of June, 1917, in that said plaintiffs had not paid the sum of $50 and the witness fees and mileage in accordance with the said order of continuance." Counsel for the appellants refused to comply with the said order or pay the costs as therein directed, and thereupon counsel for the respondents waived the payment of the $50 specified in the order, and consented that the witness fees referred to therein should abide the result of the trial; and announced that they were ready to proceed with the trial. After some discussion, the court directed the appellants (plaintiffs below), to proceed with the trial, and a request was made for time to make a showing for a further continuance, upon the ground that, anticipating that the court and opposing counsel would stand by the order previously made, the appellants did not come at that

time prepared to try the case. It appears that the appellant J. M. Reser was in court with his counsel, that some of the witnesses were in the city of Walla Walla, and most of them within the county. The court offered an opportunity to issue subpoenas for the witnesses, and directed the appellants to proceed with the trial, and upon their refusal so to do, dismissed the action. From the judgment of dismissal, this appeal is taken; and error is assigned upon the refusal of the demand for a jury trial, and upon each step taken in the case, including the entry of the judgment of dismissal.

The action being one to rescind and cancel an exchange of lands, and to cancel deeds and a mortgage, is unquestionably one of which equity has sole cognizance, and the claim for damages is but incidental thereto. The verdict of a jury would be advisory only, and there was no abuse of discretion in denying a jury trial. *Maher & Co. v. Farnandis,* 70 Wash. 250, 126 Pac. 542.

We need not consider whether or not the court erred in fixing the terms upon which the continuance to June 27th was granted, because the respondents waived such terms in open court, and the only question to be decided is whether or not the court abused its discretion in refusing a further continuance on June 27th, after the waiver of the terms. As we read the record, before the waiver of the terms of the order of continuance, the appellants conceiving that the court had committed reversible error in making such order, were attempting to lead the court to dismiss the action for noncompliance with such terms, apparently preferring to appeal on that comparatively trivial matter rather than to proceed to trial on the merits, though both counsel and client, whose absence was the basis of the prior continuance were present; and no reason ap-

pears why they could not have preserved an exception to the supposed error and proceeded with the trial. If the terms imposed appeared to be so clearly erroneous to appellants, they should have anticipated that the court and opposing counsel would also discover the error, and rectify it by revoking the order or waiving its terms, as was done, and should have been prepared to proceed in that event. Since both counsel and client were in court, and a number of other witnesses were in the city of Walla Walla, and no statement (much less showing) was then made that by means of the telephone or telegraph the necessary witnesses could not all have been procured as soon as needed, we see no abuse of discretion by the trial court. The case is peculiarly one in which the trial court should use the discretion with which the law clothes him, and since he did exercise that discretion properly and without abuse, the judgment must be affirmed.

MAIN, C. J., MITCHELL, FULLERTON, and PARKER, JJ., concur.

[No. 14815. Department One. July 29, 1918.]

THE STATE OF WASHINGTON, *Appellant*, v. HISAKACHI UMAKI *et al.*, *Respondents*.[1]

FISH—OFFENSES—UNLAWFUL FISHING — FORFEITURE OF PROPERTY. Under Rem. Code, §§ 5150-40, 5150-41, providing that all appliances used in illegal fishing shall be abated as nuisances, shall be subject to execution for payment of fines imposed upon the owners, and may be seized and forfeited to the state, boats and appliances so used may be seized and confiscated although the persons tried and convicted of illegal fishing were not the owners, and the owners intervened and showed that they had not authorized the use of the boats in American waters, and were innocent of wrongdoing.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered December 29, 1917, upon findings in favor of intervening defendants, in proceedings to forfeit boats and other property used in unlawful fishing, after a trial to the court. Reversed.

W. P. Brown and *Loomis Baldrey*, for appellant.

Hadley & Abbott, for interveners and respondents.

MITCHELL, J.—Hisakachi Umaki, I. Tabato, C. Ikemiza and T. Ikemiza were apprehended in Whatcom county for violation of the "Fisheries Code of Washington," and certain of them were tried and convicted in the superior court. At the time of the arrest, two boats and the articles used and found therein—which are the cause of this controversy—were seized. A return was made and filed by L. H. Darwin, state fish commissioner, of the seizure, to and in the superior court of said county, demanding that all the property should be forfeited to the state. The British Columbia Packers' Association, of British Columbia, intervened in the cause, alleging it was the owner and holder of

[1]Reported in 174 Pac. 447.

valid mortgage liens upon the boats sought to be confiscated, and that it was not aware the boats were used in illegal fishing and did not authorize, connive at, encourage or consent to the use of said boats for illegal fishing. K. Tomo and C. Uyeno, of British Columbia, also intervened and claimed they were the owners of the boats and other personal property seized by the state; that the boats were subject to mortgages to the British Columbia Packers' Association; that they had warned the defendants not to take the boats into American waters; that they did not authorize, connive at, encourage or consent to the use of said boats for illegal fishing and were wholly innocent of any wrongdoing. The mortgagee and owners each prayed that the petition for forfeiture be denied. Upon trial, the court made findings to the effect that defendants in the criminal case had been tried and found guilty; that the boats and other personal property had been seized and petitions for confiscation duly filed; and then further found as to the intervening owners and mortgagee the facts to be as they had alleged in their respective petitions. Conclusions were drawn and judgment entered in favor of interveners, freeing and discharging the boats and other property seized from any claim on the part of the state and directing a return thereof to the owners. The state appeals.

We are immediately interested in § 40 and a part of § 41 of the fisheries code (ch. 31, Laws of 1915, p. 81, §§ 5150-40 and 5150-41, Rem. Code), as follows:

"Sec. 40. Any fishing appliance or part thereof found in the waters of this state wherein the same are prohibited, the same being placed therein for the purpose of illegal fishing is hereby declared a public nuisance and shall be subject to abatement as a public nuisance, and it shall be the duty of the commissioner to enforce the provisions of this section; and any and all appliances used in violation of any of the provi-

sions of this act, viz.: boats, traps, nets, fish-wheels or other appliances, shall be subject to execution for the payment of any fines imposed on the owner thereof. Such appliance may be seized by the commissioner and may be forfeited to the state, and the superior courts of the state of Washington shall have exclusive jurisdiction of all such cases.

"Sec. 41. The presence in any of the waters of this state of any craft of any nature whatever equipped with any of the appliances required to be licensed by the laws of this state for the taking of fish, or of any fishing appliance for which licenses are required shall be *prima facie* evidence that the owners thereof are engaged in fishing.

"Any person who shall engage in fishing with any appliance whatsoever without having first obtained a license or made lawful application therefor shall be deemed guilty of a misdemeanor and the commissioner is hereby authorized to seize said appliance and the same shall be confiscated to the state."

The owners and the mortgagee of the property defend the judgment of the trial court on account of decisions of other courts on this subject and also because of the language of the sections of the fisheries code.

First, is the case of *United States v. Two Barrels of Whisky,* 96 Fed. 479, in which the court, after a painstaking review of the cases, some deciding for and others against forfeiture, refused judgment of confiscation of that portion of the property covered by the statute, in possession of the wrongdoer at the time of the commission of the criminal act, which belonged to another person, but upon the expressed grounds: "In the case at bar it is admitted that this property was in *possession of the wrongdoer 'without the consent and knowledge of the claimant.'* " The opinion refers to the sayings of judges in other similar cases as follows: "It is expected that the owner of property will see to the uses made of *it at his peril*"; and: "The court is also of opinion that the removal for

which the act punishes the owner with forfeiture of the goods must be made with his consent or connivance, or of that of some person employed or *trusted by him.*"

The case of *The Calypso,* 230 Fed. 962, is relied on. The case involves an application of section 10, of the act of Congress of May 6, 1882, c. 126 (22 Stat. 61), entitled "An act to execute certain treaty stipulations relating to China" as amended by the act of July 5, 1884, c. 220, 23 Stat. 115 (Comp. St. 1913, § 4297), said section being as follows:

"That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found."

The Calypso was a gasoline launch seized by the Federal authorities and attempted by them to be forfeited. The circuit court of appeals, in an opinion written by Judge Rudkin, clearly states the inquiry as follows:

"In the early part of 1914 Pettenger, accompanied by three companions and a Chinaman named Lee, took the launch on a trip to Mexico, returning to Monterey Bay with a load of contraband Chinese and contraband opium, which were surreptitiously landed on the 16th day of January. The launch was there seized by government officers, and is clearly liable to condemnation so far as the interest of Pettenger is concerned, and also so far as the interest of Sassaman is concerned, *if Pettenger was the master of the launch within the meaning of the law.* The court below decreed a forfeiture as to the interest of Pettenger, but denied a forfeiture as to the interest of Sassaman, and from the latter branch of the decree this appeal is prosecuted."

And then, after discussing the proof in the case, the court finds that Pettenger was not the master of the

launch within the meaning of the law, and affirms the decree of the trial court.

Next is the case of *United States v. Two Gallons of Whisky,* 213 Fed. 986. Section 2140, Rev. St. [U. S. Comp. St. 1916, § 4141], provides that, if any white person or Indian is suspected of *introducing* intoxicating liquor into the Indian country, "the boats, stores, packages, wagons, sleds, and places of deposit of such person" may be searched; "and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person" shall be forfeited. In violation of this law, whisky was introduced into the Indian country, and, together with the team, harness and wagon used to transport it, was seized. The whisky belonged to one who employed or induced another to carry it, which other did not own the team, harness or wagon, but had borrowed them for a proper purpose. In the forfeiture proceeding, the owners of the team, harness and wagon intervened, denying the right of forfeiture. The court, construing and applying the law, said:

"Noting that it forfeits the liquor introduced and found, regardless of ownership and introducer, the statute directs search of the *introducer's* conveyances, if he is a white person or Indian, and seizure, libel, and forfeiture of the *introducer's* conveyances and goods. This restrictive language, in view of its absence in the matter of the liquor, and in view of the nature of the statute and in view of the language of analogous statutes, *is significant of congressional intent to limit the forfeiture to the property owned by him who is guilty of the prohibited act.*"

Another case, *United States v. One Automobile,* 237 Fed. 891, is the same kind of a case as the last one referred to, and the opinion was written by the same

judge. None of these cases, however, are in point here, because the statutes involved in them are different from the one involved in this case.

Counsel further calls attention to the following portion of § 41 of the fisheries code:

"The presence in any of the waters of this state of any craft of any nature whatever equipped with any of the appliances required to be licensed by the laws of this state for the taking of fish, or of any fishing appliance for which licenses are required shall be *prima facie* evidence that the owners thereof are engaged in fishing;"

and contends that "*prima facie* evidence" is always rebuttable, and when the legislature provided that the presence of these boats in the waters of the state was *prima facie* evidence that the *owners* thereof were engaged in fishing, which the owners would have the right to rebut, and because of the closing paragraph of § 41, as follows:

"Any person who shall engage in fishing with any appliance whatsoever without having first obtained a license or made lawful application therefor shall be deemed guilty of a misdemeanor and the commissioner is hereby authorized to seize said appliance and the same shall be confiscated to the state," Rem. Code, § 5150-41;

that, therefore, the right of seizure and forfeiture is expressly limited to property *owned* by "any person who shall engage in fishing;" and because in this instance the *owners* were not engaged in fishing, the provision for confiscation has no application to them or their property. Such argument is not convincing. The *owners* who appear in this forfeiture proceeding, and in whose behalf such argument is now made, have not been charged with fishing. We are not now concerned with the crime or proof of fishing, but the forfeiture of property. Again, to say, as is further contended by

counsel in oral argument, that the term *craft* employed in the statute is only to be considered and taken as a token or means of proof of fishing and not included in the term *appliances* used to designate things which may be confiscated, does violence to a settled rule of statutory construction which requires us to also bear in mind the provisions of § 40 of this act, wherein *appliances* is defined as consisting of *boats,* traps, nets, etc.

Our statute takes no inventory of title to the property seized. There is ample authority and reason for the enforcement of such a law. In the case of *United States v. Brig Malek Adhel,* 2 How. (43 U. S.) 209, it was held that, under the act of Congress of March 3, 1819, any piratical aggression subjects the vessel to forfeiture, although the owners are innocent and the vessel was armed for a lawful purpose and sailed on a lawful voyage. Mr. Justice Story, in delivering the opinion of the court, said:

"The next question is, whether the innocence of the owners can withdraw the ship from the penalty of confiscation under the act of Congress. Here, again, it may be remarked that the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners."

To the same effect, see the following cases: *United States v. Schooner Little Charles,* Fed. Cas. No. 15,612; *Smith v. State of Maryland,* 18 How. (59 U. S.) 71; *Fisher v. McGirr,* 1 Gray (Mass.) 1, 61 Am. Dec. 381.

Another case which, on account of the similarity of the statute and the geographic conditions of the waters of the state is almost parallel with the case at bar, is *Boggs v. Commonwealth,* 76 Va. 989. The court in Virginia considered an act of the legislature which is as follows:

"If any person shall take or catch oysters with dredges or instruments other than ordinary oyster tongs within the waters of this state, he shall be deemed guilty of a felony, and upon conviction shall be confined in the penitentiary not less than one nor more than three years, and shall forfeit to the Commonwealth the vessel or boat so employed, which shall be sold at public auction by the sheriff within ten days after said conviction," etc.

Of this statute the court said:

"The theory of the law in all this class of cases is, that the vessel or other property is unlawfully used by the owner himself, or by some other person with whom he has intrusted it; that it is so used in violation of law, and to the detriment of public and private interests, which can only be effectually protected by confiscating the property itself as the offender. And this is more especially true with reference to the fisheries and oyster beds of Virginia, which have been invaded and plundered time and time again by piratical vessels, fitted out in other states and manned by ignorant and irrepressible crews, whose punishment affords but little redress to the state or compensation to the citizens."

It is plain that the case at bar is one in which the trespasser did not get possession of the boats by stealth, force or fraud, but, rather, one in which the owner yielded possession. The statute makes no mention of the title to, or ownership of, the property which, for illegal fishing, may be seized by the commissioner and confiscated to the state. Possession, not ownership, is the guide. The fate of the property is linked to that of him who uses it for the evil purpose. The legislature, in protection of its vast property in the fish of its waters, and not unmindful of the avarice and daring of those, among others, who can look across a boundary line on Puget Sound into the fertile field of a fisherman's dream, has declared a policy, as it

has the right and power to do, with reference to the seizure of property in the possession of one apprehended in the act of illegal fishing, by which, in confiscation proceedings, it will not be annoyed by questions of title, nor, prior to seizure, tempt one to despoil himself of respect for that rule which requires him to exercise watchfulness and vigilance over his own property.

The judgment in this cause is reversed, with directions to the trial court to enter a judgment declaring the property forfeited to the state.

MAIN, C. J., TOLMAN, FULLERTON, and PARKER, JJ., concur.

[No. 14893. *En Banc.* July 29, 1918.]

AUGUST WEIFFENBACH *et al., Appellants,* v. PUGET SOUND BRIDGE & DREDGING COMPANY *et al., Respondents.*[1]

APPEAL — RECORD — ABSTRACTS — DISMISSAL. Under Rem. Code, § 1730-6, insufficiency of the abstract of the evidence is not ground for dismissing an appeal, but only for motion to amend it.

Motions to dismiss an appeal from a judgment of the superior court for King county, Jurey, J., entered July 23, 1917. Denied.

E. H. Flick, Preston & Thorgrimson, and *Fred C. Kapp,* for appellants.

Roberts, Wilson & Skeel, A. H. Lundin, and *S. M. Brackett,* for respondents.

Wardall & Wardall, Ralph H. Higgins, W. E. Froude, and *Flick & Paul,* for interveners.

[1]Reported in 174 Pac. 10.

TOLMAN, J.—The decree in this case was entered in the lower court on July 23, 1917; notice of appeal was given on October 18, 1917; the statement of facts was duly served and filed; and the parties by stipulation twice extended the time for the preparation, service, and filing of the abstract and brief. The time therefor as so extended finally expired on May 15, 1918.

Respondents now move to dismiss the appeal for failure to serve and file brief, abstract, and transcript of the record within the time limited by law as extended. This motion is resisted by the appellants, and a counter motion is made for an extension of time of sixty days from June 28, 1918, for such filing, which motion is supported by a showing made by affidavits.

The first question is, whether the filing of an abstract of the record, the transcript, and the brief, or either of them, within the statutory time, is jurisdictional.

Rem. Code, §§ 1729, 1730, and 1730-1, require that a transcript of the record, abstract, and the opening brief shall be filed in the office of the clerk of the superior court within ninety days after the appeal has been taken, and to be transmitted to the clerk of this court within four months.

Laws of 1915, p. 303, § 8, provides, in effect, that this court may, if a failure to so file is found to be excusable, allow the appellant a reasonable time in which to so file and complete the record in this court. Rem. Code, § 1730-8.

We have had occasion to pass upon similar questions in a number of cases, and have uniformly held that such filing is not jurisdictional. See *Wishkah Boom Co. v. Greenwood Timber Co.*, 100 Wash. 472, 171 Pac. 234; *Kranzusch v. Trustee Co.*, 93 Wash. 629, 161 Pac. 492; *In re West Waite Street*, 89 Wash. 688, 155 Pac. 165; *Dean v. Oregon R. & Nav. Co.*, 38

Wash. 565, 80 Pac. 842; *Chapin v. Port Angeles*, 31 Wash. 535, 72 Pac. 117.

It appearing, therefore, that the jurisdiction of this court has not been lost by the failure to file which is complained of, it only remains to inquire whether the showing in support of the excuse for the failure is sufficient to justify that failure, and to warrant an extension of further time by this court (Rem. Code, § 1730-6).

In view of the extraordinary size of the record, the special difficulties of abstracting shown in this case, the amount involved, the fact that respondents can lose nothing by the delay, and the evident good faith of the appellants and the handicaps which their counsel are shown to have labored under, we think the showing is sufficient. But the time must be strictly limited in order to enable the respondents to have this case heard at the next term of this court if desired. The appellants will therefore be given an extension of forty days only from and after the filing of this opinion, in which to have on file with the clerk of this court the transcript of the record, abstract, and opening brief.

MAIN, C. J., FULLERTON, PARKER, HOLCOMB, MOUNT, MITCHELL, and CHADWICK, JJ., concur.

[No. 14609. Department One. July 30, 1918.]

O. E. WELDEN, *Appellant*, v. SKINNER & EDDY CORPORATION, *Respondent*.[1]

MASTER AND SERVANT — RELATION OF PARTIES — INDEPENDENT CONTRACTORS—WORKMEN'S COMPENSATION ACT. Constructing engineers, supervising the work of putting up buildings on a percentage basis, under a contract whereby they had no money invested and assumed no liability on contracts or pay-rolls in their name, although they employed laborers and paid them with the owner's money, are agents and employees and not independent contractors, so that the laborers were servants of the owners, within the industrial insurance act, Rem. Code, § 6604-1 *et seq.*, and not entitled to maintain actions at law for personal injuries at the plant.

SAME—WORKMEN'S COMPENSATION—EXTRA HAZARDOUS WORK—EMPLOYMENT AT "PLANT." A carpenter on the construction of a shipbuilding plant who, on his way to the toilet, passed near a galvanizing tank in the vicinity of his work when the tank exploded, is engaged in an "extra hazardous" employment within the industrial insurance act, and was injured at the employer's plant in the course of his employment.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 7, 1917, dismissing an action for personal injuries sustained by a servant, upon granting a nonsuit. Affirmed.

Jackson Silbaugh, for appellant.

J. Speed Smith, Henry Elliott, Jr., and *Hastings & Stedman*, for respondent.

PARKER, J.—The plaintiff Welden seeks recovery of damages for personal injuries which he claims to have suffered as the result of the negligence of the defendant, Skinner & Eddy Corporation. Trial in the superior court for King county, sitting with a jury, resulted, upon motion of counsel for defendant made at the conclusion of the plaintiff's evidence, in the court's taking the case from the jury, and rendering judgment

[1]Reported in 174 Pac. 452.

of dismissal, denying recovery as prayed for by the plaintiff. From this disposition of the case, the plaintiff has appealed to this court.

One of the grounds upon which respondent's motion for judgment of dismissal was made and granted was that appellant's right of action in the courts is barred by the provisions of our workmen's compensation act (Rem. Code, § 6604-1 *et seq.*), because; "—the plaintiff, at the time of the injury complained of, was an employee of the defendant, engaged in an extra-hazardous occupation"—and, "plaintiff was working at the time of said injury at the plant of his employer and was engaged in an extra-hazardous occupation." This is the only ground of dismissal we find it necessary to notice.

The following facts, which we regard as controlling here, we think, conclusively appear from the evidence introduced upon the trial. Respondent is a shipbuilding corporation, maintaining and operating a large shipbuilding plant at Seattle. At the time in question, the construction of buildings, constituting portions of respondent's plant, was being done under a contract with the engineering firm of Grant Smith & Company; which contract, to the end that we may determine the relation of respondent to that firm, we quote from as follows:

"Agreement Covering the Erection of Buildings for Skinner & Eddy Corporation.

"This Memorandum of Agreement, made and entered into this 17th day of January, A. D. 1916, between Skinner & Eddy Corporation, of Seattle, Washington, hereinafter referred to as 'the owner,' and Grant Smith & Co., a copartnership, hereinafter referred to as 'the constructing engineers,' Witnesseth:

. . .

"The constructing engineers hereby agree, for the consideration hereinafter named, to take charge, for

the owner, of the work specified by the description of work hereto attached.

"It is understood that the constructing engineers are to act as agent for the owner, and are to be guided in all matters by its instructions, or, if the owner so direct in writing, by the instructions of its architect. The description of work above referred to defines the scope of the work as now contemplated. This is subject to change at any time at the discretion of the owner, and may be increased or diminished at its pleasure. . . .

"The constructing engineers agree to enter upon the performance of the work immediately, and to bring to completion as rapidly as the best interests of the owner may dictate. The work will be carried on at such points, in such sequence, and at such times as the owner may direct, and as much work at night and on Sundays and holidays shall be done as the owner may request. . . .

"The constructing engineers will insure all their employees under the Washington Employees Insurance law, known as the Washington State Industrial Insurance, and will protect and save harmless the owner from any and all liability on account of injury to employees engaged in the construction of the buildings or to the public, on account of accident or damage occasioned in connection with the work undertaken by said constructing engineers.

"The fees paid to the Washington State Industrial Insurance Commission shall be reimbursed to said constructing engineers. . . .

"It is understood that the owner has full control over purchases and contracts. Bids on the various parts of the work will be secured by the constructing engineers, and will be submitted to the owner for decision. All contracts, orders, payrolls and other obligations shall be in the name of Grant Smith & Co., agents, and the constructing engineers do not assume any liability whatsoever under or by reason of such contracts, orders, payrolls or other obligations so entered into by them as agents for the owner. . . .

"The owner agrees to pay to the constructing engineers for their services, in connection with this work,

a sum amounting to ten per cent. of the total cost, with the exception as noted below. . . .

"Bills for material and labor, including payrolls, will be checked by the constructing engineers and forwarded to the owner for payment, or, if the owner prefers to advance funds to the constructing engineers as needed, the constructing engineers will make payment. . . .

"Should the owner become, at any time, dissatisfied with the manner in which the constructing engineers are conducting the work, or should the owner decide to discontinue work upon the building, it shall be at liberty, after one day's notice in writing, to terminate the employment of the constructing engineers, and to enter upon the premises and take possession of the work and all tools, material, machinery and appliances thereon. In case this action is taken by the owner, the constructing engineers shall receive, under sections 6, 7 and 8, reimbursement both for their expenditures to date of owner's taking possession, and for their own services, an amount which will equal ten per cent of the cost to the owner at that date."

Grant Smith & Co., while working under this contract, employed appellant as a carpenter. On August 31, 1916, appellant was working upon one of the buildings being constructed for respondent under the supervision of Grant Smith & Company. About 1:30 p. m. of that day, appellant left his work with a view of being absent only temporarily therefrom, to go to a toilet, a short distance away but upon the premises and at the plant of respondent. Proceeding on his way, he passed near respondent's galvanizing tank, while it was being operated by one of the employees. This tank was some thirty-five feet from where appellant left his work and in passing near it he was following the usual way to the toilet. When he was near the tank, an explosion occurred, throwing molten metal upon him, and causing the injury for which he seeks recovery in this action. Grant Smith & Company, in

compliance with their contract with respondent, had reported to the industrial insurance department and caused contribution to be made to the accident fund, based upon the payroll of employees employed in the construction work they were doing under their contract with respondent. This contribution to the accident fund was in fact paid direct by respondent into that fund. While the workmen were paid by Grant Smith & Company, the money was at the times of such payments furnished by respondent so that Grant Smith & Company had no money invested in the contract in so far as the payment of workmen was concerned. Indeed, the contract warrants the conclusion that Grant Smith & Company were relieved of the necessity of having any money invested in the contract even as to the cost of material and other expenses incurred in their prosecution of the work. Appellant, after his injury, proceeding upon the theory that he was an employee of Grant Smith & Company, and not of respondent, and that he had been injured by the negligence of respondent, notified the industrial insurance department that he elected to seek recovery in the courts against respondent instead of claiming compensation from the accident fund. He thereafter commenced this action in the superior court for King county.

Looking to the contract between Grant Smith & Company and respondent above quoted from, under which they, as constructing engineers, were supervising the work for respondent upon which work appellant and others were employed, it seems quite plain to us that Grant Smith & Company were in no sense independent contractors, but were sustaining a relation to respondent which in law amounted to little else than ordinary supervising engineers or architects. They were, in any event, nothing more than employees and agents of respondent. Our decisions in: *North Bend*

Lumber Co. v. Chicago, Milwaukee & P. S. R. Co., 76 Wash. 232, 135 Pac. 1017; *Schade Brewing Co. v. Chicago, Milwaukee & P. S. R. Co.*, 79 Wash. 651, 140 Pac. 897, and other cases, render this clear as a proposition of law.

We think it follows that the workmen, including appellant, who were at work upon the construction of respondent's buildings, under the supervision of Grant Smith & Company, were employees of respondent and were subject to the workmen's compensation act.

That the work was extra hazardous is, of course, beyond question; and that appellant was injured upon the premises and at the plant of respondent, while in the course of his employment, we think is equally plain. Among the decisions of the courts lending support to this conclusion we note the following: *Sedlock v. Carr Coal Min. & Mfg. Co.*, 98 Kan. 680, 159 Pac. 9, L. R. A. 1917B 372; *Haller v. Lansing*, 195 Mich. 753, 162 N. W. 335, L. R. A. 1917E 324; *Archibald v. Ott*, 77 W. Va. 448, 87 S. E. 791, L. R. A. 1916D 1013; *In re Stacy*, 225 Mass. 174, 114 N. E. 206; *Zabriskie v. Erie R. Co.*, 86 N. J. L. 266, 92 Atl. 385, L. R. A. 1916A 315. The last cited case is of special interest because it involves injury to a workman while going to a toilet resorted to by the workmen of the plant.

We conclude that, under the facts conclusively shown, the trial court did not err in taking the case from the jury and ruling, as a matter of law, that appellant could not maintain an action in the courts for recovery of damages for the injuries sustained by him, but that he must look to the accident fund to compensate him for such injuries.

The judgment is affirmed.

MAIN, C. J., FULLERTON, TOLMAN, and MITCHELL, JJ., concur.

[No. 14668. Department One. July 30, 1918.]

U. G. MOORE, *as Receiver etc., Respondent,* v. FREMONT STATE BANK, *by W. E. Hanson, as State Bank Examiner, Appellant.*[1]

BANKS AND BANKING—POWERS—PURCHASE OF STOCK — STATUTES. Banking corporations may purchase and hold stock in general corporations; in view of Laws 1905, p. 51 (Rem. Code, §3684), authorizing corporations generally to purchase and hold stock in other corporations, which was not impliedly repealed, except as to certain classes named, by subsequent legislation, Laws 1907, p. 518, § 15 and its amendments (Rem. Code, §§ 3290, 3292, and Laws 1917, p. 271) prohibiting a banking corporation from holding its own stock or the stock of any other banking corporation, excepting the stock of Federal Reserve banks and trust companies.

APPEAL—DECISION—AFFIRMANCE—EXTENDING TIME FOR PAYMENT. Upon appeal in good faith from a judgment extending to appellant a privilege provided payment was made within a specified period, which expired pending appeal, affirmance of the judgment will be with an extension of time for exercising the privilege.

Appeal from a judgment of the superior court for King county, Jurey, J., entered September 11, 1917, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Modified.

Hugh C. Todd and *M. M. Richardson,* for appellant.

Bell & McNeil (*L. H. Legg,* of counsel), for respondent.

FULLERTON, J.—On August 1, 1910, the Fremont State Bank, a banking corporation organized under the laws of the state, entered its name as a subscriber to five shares of stock in a corporation then in the process of formation, afterwards organized and known as the Woodland General Hospital, the subscription calling for a payment of $500. The hospital became insolvent some time in the year 1916, and the respondent Moore

[1]Reported in 173 Pac. 1089.

was appointed as its receiver. The bank became insolvent in January, 1917, and was taken in charge by the state bank examiner for liquidation. The present action was begun to recover upon the subscription. The bank examiner on behalf of the bank defended on the grounds, first, that the subscription was *ultra vires* the bank and void; and, second, that the bank had been relieved of the obligation through an agreement with the hospital by which it had procured another to take over the subscription and assume the obligation. The cause was tried by the court sitting without a jury, and resulted in a judgment in favor of the receiver of the hospital. The bank examiner appeals.

The appellant urges in this court the contentions made in the court below. He invokes the rule, generally announced by the courts, that a banking corporation, in the absence of express statutory authority, may not traffic or deal in the capital stock of another corporation, and argues that there is no such express statute in this state. To an understanding of the question, a brief review of the statutes and of this court's holdings thereon is necessary.

Prior to the meeting of the legislative assembly of 1907, there was no special statute relating to the organization of banking corporations. Such corporations were formed under the general incorporation laws of the state. While these general laws contained provisions applicable to banking corporations not applicable to corporations of other characters, such as, for example, that banking corporations must have a capital stock not less than a minimum sum named, three-fifths of which was required to be paid in, and each stockholder was made to assume a liability not imposed upon stockholders of other corporations, the manner of organization and the statutory enumeration of corporate powers were the same in each. With the stat-

utes in this condition, this court held that it was against the public policy of the state to permit one corporation to subscribe for or deal in the corporate stock of another corporation. *Denny Hotel Co. v. Schram,* 6 Wash. 134, 32 Pac. 1002, 36 Am. St. 130; *Parsons v. Tacoma Smelting & Refining Co.,* 25 Wash. 492, 65 Pac. 765.

At the legislative session following the latter of these decisions, a statute was enacted granting to corporations the powers which the court denied them. The act was broad in its terms. It provided that:

"Any corporation heretofore or hereafter organized under the laws of this state or under the laws of any other state or territory of the United States and doing business in this state shall have power and authority to subscribe for, acquire by purchase or otherwise and to own, hold, sell, assign and transfer shares of the capital stock of any other corporation and by its duly authorized officer or proxy to vote such shares at any and all stockholders' meetings of the corporation whose shares are so held, and to have and exercise all the rights, powers and privileges of any other stockholder, except that such corporate owner cannot be a member of the board of trustees." Rem. Code, § 3684.

The act also validated "all existing holdings by any such corporation in the shares of the capital stock of any other corporation." Laws 1905, p. 51.

The first of the acts relating specially to the organization of banking corporations was enacted in 1907. Laws 1907, p. 518. The act need not be outlined here. It is sufficient to say that it contains no direct provision withdrawing banking corporations from the operation of the act of 1905, and that there is nothing in its provisions that can be construed as impliedly so doing. On the contrary, in so far as the subject is touched upon at all, the implication is the other way. In § 15 of the act, it is provided that no bank shall be the pur-

chaser of its own stock, or any part of it, as security for loans; an implied admission, it would seem, that it could lawfully purchase stock in other corporations.

The act of 1907 was amended in certain particulars in 1909. Laws 1909, p. 692 (Rem. Code, § 3290 *et seq.*). The only change made in § 15 was to add thereto the sentence, "no bank shall subscribe for or purchase the stock of any other banking corporation." The act has been added to and amended by later sessions of the legislature, particularly by the sessions of 1915 and 1917. Laws 1915, p. 126 (Rem. Code, § 3292 *et seq.*); Laws 1917, p. 271. In both of these acts the provisions of § 15 of the act were remodeled, the first excepting from the prohibition against the purchase of bank stock the stock of Federal reserve banks, and the second adding to the prohibition stock in trust companies. Neither, however, contains any prohibition against the purchase of the capital stock of corporations other than those specifically enumerated.

The constitutionality of the act of 1905 was sustained by this court in the case of *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637. There can be no question that the act was as applicable to banking corporations as it was to other corporations. The effect of the act was to change the public policy of the state from that which the court had theretofore declared it to be to an opposing policy. This was within the powers of the legislature. As we said in *Shorts v. Seattle*, 95 Wash. 531, 164 Pac. 239:

"We know of no better criterion by which to determine any given question of public policy than the utterances of the state legislature upon that question."

Since, therefore, we find express statutory authority for a subscription by a banking corporation to the capital stock of another corporation, and no express

or implied repeal of that authority, we can but conclude that such a subscription is valid.

The second question, whether there was a release of the bank from the obligation assumed, requires no critical review of the evidence. Clearly, there was a conditional agreement for such a release, but the evidence shows with equal clearness that the condition was not complied with.

The present action as originally instituted was against a number of stockholders of the insolvent hospital corporation, in addition to the appellant. As to these others, a compromise agreement was entered into by which they were permitted to satisfy their several obligations by paying a given per centum thereof. This privilege was extended to the appellant, provided it would make the payment within a definite time named in the judgment of the court. This time has expired pending the appeal; but since an appeal is a matter of right and it is not the policy of the law to penalize its taking when done in good faith, the appellant should be granted thirty days after the return of the remittitur from this court in which to comply with the alternative provision of the judgment; paying interest at the legal rate on the amount found due by the terms of the agreement from the date named in the judgment of the lower court to the date of satisfaction. The respondent will recover costs in this court.

The judgment is affirmed, with the modification indicated.

MAIN, C. J., MITCHELL, PARKER, and TOLMAN, JJ., concur.

[No. 14772. Department Two. July 30, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Thomas A. E. Lally et al., Appellants,* v. JOHN J. CADIGAN *et al., Respondents.*[1]

INSURANCE—COMPANIES—STOCKHOLDER'S MEETINGS—PROXY VOTING—LIMITATIONS—AUTHORITY OF TRUSTEES—STATUTES. Under Rem. Code, § 6059-63, providing that the trustees of an insurance company may vote to permit an officer of the corporation to vote proxies at the annual stockholders' meeting, a resolution of the trustees permitting such voting, but limiting the authority to special matters and attempting to designate the persons to be voted for as trustees, is a valid authority for proxy voting by an officer, but the attempted restrictions thereon are void as beyond the authority of the trustees, and contrary to public policy and the intent of the legislature.

Appeal from a judgment of the superior court for Spokane county, W. W. Zent, Judge *pro tempore,* entered March 4, 1918, upon findings in favor of the defendants, in *quo warranto* to try title to offices of a corporation, after a trial to the court. Affirmed.

G. M. Ferris and *Thomas A. E. Lally,* for appellants.

Graves, Kizer & Graves, for respondents.

MACKINTOSH, J.—The annual meeting of the stockholders of the New World Life Insurance Company was to be held on February 12, 1918, and the defendant Cadigan, who was president of the company and one of its trustees, held proxies for 88,698 of the 113,000 shares of the company's capital stock. At a meeting of the board of trustees, held before the stockholders' meeting, the question of allowing the voting of proxies by an officer of the company was discussed and acted upon. This was in pursuance of a requirement of the insurance code, which provides:

"Every domestic company shall hold an annual meeting in the month of January or February, of its

[1]Reported in 174 Pac. 965.

stockholders, if a stock company, or members, if a mutual company, for the purpose of receiving the report of its officers and trustees, and to elect trustees. Each share of stock in a stock company, and each policy-holder in a mutual company, shall be entitled to one vote in the election of trustees, and if unable to attend in person, may appoint any stockholder or member his proxy to vote his stock or policy, but no officer of said company shall be allowed to vote the proxy of any stockholder or member thereof; Provided, however, officers of stock companies may do so when the majority of the trustees vote to permit such action." Laws 1911, ch. 49, p. 208, § 63 (Rem. Code, § 6059-63).

The action of the board of trustees took the form of a resolution that the officers of the company be authorized to vote proxies held by them at the annual meeting of the stockholders, but limited that authority to thirteen special matters and attempted to designate the persons to be voted for as trustees, and to prevent the voting for the removal of any of the then trustees, and limited the right of the proxy holder to vote other than as directed in the resolution, upon the question of amending the by-laws of the company. At the meeting of the stockholders, the defendant Cadigan voted the proxies held by him generally and not in accordance with the resolution, and as a result of this voting, trustees other than those named in the resolution were elected, which gave rise to this action, this being a proceeding in *quo warranto* to try title to certain offices of the company, the relators claiming to have been duly and legally elected by the old board of trustees, and the defendants being the officers selected by the board elected at the stockholders' meeting in the manner referred to. The sole question presented is whether or not the defendant Cadigan legally voted the proxies held by him at the stockholders' meeting; the relators'

position being that the board of trustees had the right to limit the use of the proxies when it authorized the voting of proxies at the stockholders' meeting, and the defendants claiming that the only authority held by the board of trustees was to either grant or withhold permission for the officers of the company to vote proxies held by them.

Upon this question, there has been no adjudication so far as the diligence of counsel and this court can determine. The relators claim that the situation is analogous to that presented where a city, in passing a franchise ordinance, inserts restrictions which it had no right to impose, and cite decisions holding that the public service corporation seeking the benefit of the franchise ordinance is nevertheless bound by such restrictions. *Southern Bell Tel. & Tel. Co. v. Richmond,* 103 Fed. 31. Also, by analogy, it is asserted, that the rule applying in the construction of statutes should be applied to the question at bar. *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540. That the resolution must be considered as a whole, and that if the trustees did not have the power to limit the manner of using the proxies, then the entire resolution must be held to be of no avail; because, without the limitations contained in the resolution, the board of trustees would not have passed it.

We have held in *State ex rel. Lindsey v. Derbyshire,* 79 Wash. 227, 140 Pac. 540, that, where the body of an act and the limiting clause are inseparably connected in purpose and substance, they cannot stand one without the other. It is apparent that the intention of the board was to dictate the manner of the use of the proxies.

On behalf of the defendants, it is claimed that the resolution should be interpreted under the maxim *omne majus continet in se minimis;* and that, where

more is done than ought to have been done, that portion for which there was authority is valid, and the resolution should be held to be void only as to that part passed in excess of authority; this rule being applied in cases where the legislative body has attempted to exceed the powers conferred upon it, and that, in cases where a city council was authorized to incur indebtedness to a certain amount, an attempt to create a greater indebtedness fails only so far as it exceeds the constitutional limitation. *Dunn v. Great Falls,* 13 Mont. 58, 31 Pac. 1017; *Germania Sav. Bank v. Darlington,* 50 S. C. 337, 27 S. E. 846.

In the case of *Scott v. Flowers,* 61 Neb. 620, 85 N. W. 857, the state constitution allowed the commitment to the reform school of children under sixteen, but the legislature of Nebraska provided for the commitment of children under eighteen—the court held that, under the statute, commitment of those under sixteen was legal. In trade agreements, the courts have held valid so much of the agreements as the parties might lawfully make, and have disregarded those portions to which they could not lawfully agree; the agreements, being held to be divisible, were enforcible so far as valid. *Lange v. Werk,* 2 Ohio St. 519; *Peltz v. Eichele,* 62 Mo. 171; *Thomas v. Miles,* 3 Ohio St. 274; *Smith's Appeal,* 113 Pa. St. 579, 6 Atl. 251; *Mallan v. May,* 11 M. & W. (Eng.) 653.

Analogy is also claimed between the situation here and that presented in cases involving the law relating to conditions, it being argued that that portion of the resolution which authorizes the voting of the proxies was in the nature of a grant, and that part which directed how the proxies should be voted was in the nature of a condition annexed to the grant, and the grant being valid but the condition invalid, the grant

will be sustained and the condition defeated. 4 Kent, Commentaries (13th ed.), 131; 13 Cyc. 687; *St. Louis J. & C. R. Co. v. Mathers,* 71 Ill. 592, 22 Am. Rep. 122; *Barksdale v. Elam,* 30 Miss. 694; *Bradley v. Spokane & Inland Empire R. Co.,* 79 Wash. 455, 140 Pac. 688, L. R. A. 1917C 225.

Another analogy is claimed by the defendant to exist in the law of contracts, in reference to the enforcement of a contract legal in part and in part illegal.

A treatise might be written in an attempt to explain and differentiate these claimed analogous situations, but no purpose would be served thereby except to further burden the library space of the members of the bar here and yet to come. We are content to hold that the presumptions which are applicable where legislative acts are under consideration are not necessarily determinative of private rights between private individuals.

It was not the intention of the legislature, in passing the section that we have under scrutiny, that thereby it should place in the hands of the board of trustees of an insurance company the power to perpetuate itself by means of restricting the voting of proxies, or by that means to eliminate from the stockholders the ability to control the destinies of their company. The stockholder himself in giving his proxy might couple with it such directions to his representative as he might see fit and those restrictions the board of trustees could nullify, if the construction of the resolution contended for by the relators is correct, by coupling with the authority to vote the proxy the imposition of explicit directions as to the manner of so voting. It is possible that owners of stock might desire, as they have a right, to accompany their proxy with secret instructions to their representative as to his manner of voting their stock upon certain questions, and it could not be

seriously claimed, we take it, that the board of trustees could deprive the stockholder of his right to impose such restrictions by attempting to compel the representative to vote contrary thereto. Dozens of instances of this nature might be suggested which could easily arise in the operation of the modern complicated business conducted by a large insurance company. We take it that it cannot be successfully argued that the attempted restrictions contained in the resolution were not without the power of the board of trustees to enforce. We have, then, the bald question of whether, having given the power to vote the proxies, the attachment to that power of void conditions destroys the power itself. We take it that under the statute the board of trustees was to determine whether at the ensuing meeting of the stockholders the policy of allowing proxies to be voted by officers of the company should or should not prevail, and this policy was not to be determined with reference as to how the officer holding the proxy might have been instructed by his principal to vote the stock or how his judgment, in the absence of instructions from his principal, might prompt him to vote it. Having determined upon the policy, the board of trustees exercised all the rights which it possessed, and it was powerless to prevent the agency created by the giving of the proxies from being executed according to the will of the stockholder, otherwise the board would have a power greater than that of merely granting or refusing the right for these proxies to be voted; for it could assume, as it attempted to do here, authority over the proxy, making the holder thereof their agent rather than the agent of the stockholder, by directing how the stock should be voted, substituting its judgment for that of both the stockholder and his agent. Not only was this, as we have said, a power not given by

the statute, but was the attempt to exercise a power which is contrary to sound public policy. The board of trustees, in this case, by its resolution, sanctioned the voting of proxies. Having done that, its authority ceased and the officer was at liberty to proceed to vote the stock which he represented according to the directions of the stockholder, or if no directions were given, according to his own judgment. Whether this is or is not analogous to rules adopted in different decisions involving other relations and conditions, is a matter of very little materiality—we are satisfied that it is good every-day common sense, and is the rule here announced for the construction of this statute.

The judgment will be affirmed.

MAIN, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

[No. 14814. Department One. July 30, 1918.]

ALBERT W. BYRNES, *Administrator etc., Respondent,* v. LEE D. PAYNE, *Appellant,* R. C. JULIAN, *Defendant.*[1]

LIMITATION OF ACTIONS — TOLLING STATUTE — ACCEPTING DEED SUBJECT TO MORTGAGE. The acceptance of a deed reciting that it was subject to a certain mortgage, which was excepted from the warranty clause, is not such an acknowledgment of the mortgage as to toll the statute of limitations and prevent the bar of the statute for another period.

Appeal from a judgment of the superior court for Walla Walla county, Smith, J., entered December 7, 1917, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Reversed.

[1]Reported in 173 Pac. 1091.

John H. Pedigo and *Sharpstein, Smith & Sharpstein,* for appellant.

Earl W. Benson, for respondent.

MITCHELL, J.—On October 20, 1907, R. C. Julian gave Edward Byrnes his note for $300, due in one year. On November 7, 1907, Julian gave Byrnes a mortgage on the real property involved in this action to secure payment of the note. The mortgage was recorded January 6, 1908. There were, after the date of the mortgage, one or more conveyances, in regular line, of the real property, in each of which it was stated that the conveyance was subject to the mortgage to secure the payment of the $300 note due Byrnes. The last of such conveyances was made by William H. Kelly and wife to appellant, Lee D. Payne, on October 14, 1912. The clause containing covenants of defense and warranty in this last mentioned deed has the words, "except one certain note of three hundred dollars ($300) secured by mortgage and interest, payable to Edward Byrnes."

Edward Byrnes died, and Albert W. Byrnes was appointed administrator of his estate in 1916. Nothing was paid on the note other than $1 by Julian, on August 25, 1917. The administrator sued November 2, 1917, on the note and mortgage, making Payne a party defendant on account of the interest he held in the premises, which was alleged to be inferior to the mortgage. Payne appeared in the action and defended on the strength of the statute of limitations, which defense found no favor with the court, and a decree was entered that, among other things, subordinated and foreclosed all rights of Payne. Payne appeals.

There is a diversity of opinion among the courts concerning the one question involved. Some courts hold that a grantee who, prior to the bar of the mort-

gage debt, accepts title subject to the mortgage thereby makes such acknowledgment as will interrupt or toll the statute and keep the debt on foot for another statutory period. Such, however, is not the rule in this state. In the case of *Boyer v. Price*, 45 Wash. 667, 88 Pac. 1106, we said:

"The second objection, namely, that the exception in the warranty clause in the deed was so far an acknowledgment of the existence of the mortgage as to estop the respondent from claiming the benefit of the statute of limitations, is likewise not well taken. As was said in *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554: 'The exception of the mortgage from the covenant of warranty therein, does not estop the grantee to dispute the validity of the mortgage as against the holder thereof.' "

The judgment, so far as it affects the rights of appellant, is reversed with directions to the trial court to enter judgment in appellant's favor, decreeing the premises are his, free and clear of any lien on account of the mortgage.

MAIN, C. J., PARKER, TOLMAN, and FULLERTON, JJ., concur.

[No. 14696. Department One. July 31, 1918.]

ISLAND BELT STEAMSHIP COMPANY, *Appellant*, v. J. & M. CAFE, *Respondent*.[1]

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE—SUFFICIENCY. An assistant purser on a boat, authorized to pay operating expenses from collections, had apparent authority to cash checks, having previously had such authority as purser, and the evidence warranting a finding that no sufficient notice of change of authority had been given.

Appeal from a judgment of the superior court for King county, Tallman, J., entered September 29, 1917, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Martin J. Lund, for appellant.

T. D. Rockwell, for respondent.

PARKER, J.—The plaintiff steamship company seeks recovery from the defendant, J. & M. Cafe, of the amount of three certain checks which were issued and made payable to the order of the plaintiff and delivered to one Doan, as its agent, in payment of freight charges. The checks were indorsed by Doan, as agent for plaintiff, and delivered to the defendant, he receiving from it in cash the total amount of the checks, which were thereafter, in due course, collected by the defendant from the banks upon which they were drawn. The plaintiff seeks recovery from the defendant upon the theory that Doan was without authority, actual or implied, to indorse the checks and receive cash therefor. Trial in the superior court for King county, sitting without a jury, resulted in findings and judgment denying to the plaintiff the relief prayed for, from which it has appealed to this court.

[1]Reported in 174 Pac. 19.

During the period in question, appellant was the owner of the steamboat "Fairhaven," and we think the evidence warrants the assumption that its business consisted wholly in the operation of that boat in the carrying of freight and passengers between Anacortes, its home port, and Seattle and way points. Respondent, during the same period, owned and operated a cafe in Seattle. In the spring of 1916, Doan became the employee of appellant as purser upon its boat, which employment continued until sometime in October, 1916. Doan was not only appellant's purser, but to all outward appearance he was the general business representative of appellant, especially at the Seattle end of the line. It was his duty to solicit business for the boat, collect freight charges and passenger fares, and pay the expense of operating the boat from collections so made, though it may be conceded that he had no authority to sign checks for that purpose against funds which were upon deposit in appellant's bank account. Appellant had no office in Seattle other than upon the boat. Doan and other employees, in a general way, seem to have made respondent's cafe their headquarters when in Seattle. Respondent's manager knew of Doan's relation to the appellant. Respondent from time to time cashed checks for other employees when they were in Seattle, the checks so cashed being those drawn against appellant's bank account but not signed by Doan. Checks were cashed for Doan by respondent which were checks payable to appellant which he had received from shippers in payment of freight charges. Some dozen or more of such checks had been cashed for Doan by respondent prior to October, 1916, he indorsing and delivering them to respondent as agent for appellant. In October, 1916, Doan was succeeded as purser by another employee. Thereafter Doan was

employed by appellant to assist the new purser and also to act as its representative at the Seattle end of the line. He then had business cards printed purporting to show that he was appellant's agent, which he used in soliciting business for the boat. This was done, we think, with appellant's approval. He also made several trips upon the boat assisting the new purser in his work. Respondent's manager knew of the nature of Doan's employment and authority prior to October, 1916, and believed that such authority continued until after it cashed the three checks here in question. Soon after the cashing of these checks, respondent's manager was told by appellant's general manager not to cash any more checks for Doan. The evidence is not specific as to what other conversation then occurred, but the inference is warranted that appellant's manager knew that respondent had been cashing checks for Doan prior thereto in a similar way, and did not then claim that Doan had no authority to indorse the checks so cashed. The checks here involved were upon their face payable to appellant and were for the sums of $165, $148, and $3, respectively, all of which were indorsed in blank by Doan as agent for appellant, delivered to respondent, it paying to Doan the full face value thereof as a matter of accommodation. This we think is a fair summary of the view of the facts taken by the trial court, and which we think is warranted by the evidence.

Counsel for appellant invokes the general rule that an agent who is merely authorized to collect money for his principal in payment of debts due his principal is not thereby impliedly authorized to indorse checks which he receives in payment of such debts, and collect money thereon, citing: *Deering & Co. v. Kelso*, 74 Minn. 41, 76 N. W. 792, 73 Am. St. 324; *Graham v.*

United States Savings' Institution, 46 Mo. 186; *Sinclair & Co. v. Goodell,* 93 Ill. App. 592; *Goodell v. Sinclair & Co.,* 112 Ill. App. 594.

We think, however, this rule is not applicable to the facts in this case, since it plainly appears that Doan was something more than a mere soliciting agent. He was, we think, the financial agent of appellant as well, in that he was authorized to pay from the collections made by him the expense of operating the boat; in other words, he was a disbursing as well as a collecting agent. This, it seems to us, warranted the trial court in concluding that he had authority to reduce his collections, made in the form of checks, to money, by indorsing checks so received, as agent for appellant. Observations made by this court in *Graton & Knight Mfg. Co. v. Redelsheimer,* 28 Wash. 370, 68 Pac. 879, lend support to this conclusion. We have not lost sight of the fact that Doan's employment as purser changed in October, 1916, and that the checks here involved were not cashed by him until February, 1917. But we think the trial judge was warranted in concluding that his employment continued under such circumstances as to indicate to respondent that he was still the agent of appellant, possessing the same authority as while he was acting as purser prior to October, and that respondent was warranted in believing, and did in good faith believe, that Doan's relation to appellant had not changed in so far as his authority was concerned. The question here to be determined, in its last analysis, is one of fact. Had the cause been tried in the superior court by a jury, resulting in a verdict in favor of respondent, we are quite convinced we would not be justified in disturbing such verdict. While, of course, we are not bound by the conclusions of the trial court upon questions of fact as we would be by the verdict

of a jury upon such questions, this record, as a whole, convinces us that we would not be warranted in disturbing the conclusion reached by the trial court.

The judgment is affirmed.

MAIN, C. J., MITCHELL, TOLMAN, and FULLERTON, JJ., concur.

[No. 14742. Department Two. July 31, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. E. M. SMITH, *Appellant*.[1]

CRIMINAL LAW—EVIDENCE—INTENT—OTHER CRIMES. In a prosecution for selling morphine without a physician's prescription, proof of giving dry morphine on a prescription calling for morphine in solution was sufficient proof of intent to establish criminality; hence it was error to admit evidence of other illegal sales of morphine to other persons for the purpose of establishing intent.

WITNESSES—IMPEACHMENT—EFFECT OF USE OF DRUGS. In a prosecution for selling morphine without a physician's prescription, where the prosecuting witness, a sporting woman, was under the influence of morphine at the time of the sale and of her accusation, the defense is entitled to prove by expert testimony the effect of the drug upon her mind and memory.

CRIMINAL LAW—TRIAL—MISCONDUCT OF JUDGE—COMMENT. It is unlawful comment for the court to instruct the jury to view with caution and suspicion the evidence of a witness addicted to the use of morphine.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered December 31, 1917, upon a trial and conviction of unlawfully selling morphine. Reversed.

Nuzum, Clark & Nuzum and *Turner, Nuzum & Nuzum*, for appellant.

John B. White and *T. T. Grant*, for respondent.

[1]Reported in 174 Pac. 9.

MACKINTOSH, J.—The appellant was convicted of selling morphine without a physician's prescription. Evidence was admitted of various alleged illegal sales of morphine by the appellant to four persons other than the prosecuting witness. Offered evidence of a medical expert was refused, this evidence being offered to show the effect of morphine upon the mental condition of a person addicted to its use, as was the prosecuting witness at the time of her purchase of the drug from the appellant, and her arrest. Instructions were refused which directed the jury to view with caution and suspicion the testimony of prostitutes and drug users. Error is predicated upon these matters, and several others which we will not discuss in this opinion.

I. There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial, and such testimony should only be admitted when clearly necessary to establish the essential elements of the charge which is being prosecuted. To establish guilty intent, unlawful motive, or criminal knowledge, it is permissible to show that the act charged against the defendant was one in a series of similar ones; but beyond this, the state cannot go and, for the purpose of securing a conviction, show the perpetration of other similar acts, even though committed in furtherance of a general scheme, where there is no proof required to establish intent, motive or knowledge, other than proof of the act charged itself. In other words, where the act charged against the defendant itself characterizes the offense, the guilty intent is proven by proving the act. Here the proof of giving of dry morphine on a prescription calling for morphine in solution was proof of the intent and nothing more was necessary to establish criminality. This has been the holding of this court in

State v. Bokien, 14 Wash. 403, 44 Pac. 889; *State v. Gottfreedson,* 24 Wash. 398, 64 Pac. 523; *State v. Oppenheimer,* 41 Wash. 630, 84 Pac. 588; and has not been modified by *State v. Pittam,* 32 Wash. 137, 72 Pac. 1042; *State v. Craddick,* 61 Wash. 425, 112 Pac. 491; *State v. Wappenstein,* 67 Wash. 502, 121 Pac. 989; *State v. Downer,* 68 Wash. 672, 123 Pac. 1073, 43 L. R. A. (N. S.) 774; *State v. Hazzard,* 75 Wash. 5, 134 Pac. 514; *State v. Shea,* 78 Wash. 342, 139 Pac. 203; *State v. Schuman,* 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A 633; which are all cases where evidence of other criminal acts was admissible as "implying a guilty intention on the appellant's part" in doing the act for which he was on trial. In the case before us, the evidence not coming within the exception to the rule, should have been excluded.

II. The evidence of the state having shown that the prosecuting witness, a sporting woman, was under the influence of morphine at the time of the alleged sale to her by the appellant, and that she was arrested then by an officer to whom she related her story, the defense was entitled to prove, by expert testimony, the effect of the drug upon the mind and memory of its user. *Anderson v. State,* 65 Tex. Cr. 365, 144 S. W. 281; *People v. Webster,* 139 N. Y. 73, 34 N. E. 730.

III. While testimony is admissible showing the character of, or effect of the use of drugs upon, a witness as affecting her credibility, it is not proper for the court to violate the constitutional prohibition against commenting upon the evidence by instructing the jury that it should regard the testimony of any class of witnesses with caution or suspicion.

For the errors discussed the judgment is reversed.

CHADWICK, HOLCOMB, and MOUNT, JJ., concur.

[No. 14801. Department One. July 31, 1918.]

WILLIAM McKAY *et al.*, *Respondents*, v. HENRY MEYER *et al.*, *Appellants*.[1]

FRAUDS, STATUTE OF—ORAL AGREEMENT TO RESCIND SALE OF LAND—EXECUTED CONTRACT. An oral rescission of a contract for the sale of lands is fully executed and taken out of the ban of the statute of frauds, where the vendee, in default, surrendered possession to the vendors, who returned the notes for the purchase price and maintained hostile possession.

Appeal from a judgment of the superior court for Adams county, Truax, J., entered October 19, 1917, upon findings in favor of the plaintiffs, in an action to quiet title. Affirmed.

G. E. Lovell, for appellants.

Adams & Naef, for respondents.

TOLMAN, J.—This action was brought to quiet title, based on the abandonment and surrender by appellants of a bond for a deed, and on adverse possession, resulting in a decree quieting respondents' title as prayed for, from which decree the appeal is taken.

There is but little controversy as to the facts. In the year 1903, respondents, who were then the owners of the land in question, contracted to sell the same to appellants for the sum of $3,507, and gave their bond for a deed conditioned for the conveyance of the title to appellants when the purchase price should be fully paid, taking back notes evidencing the deferred payments, which contract was never recorded. Appellants went into and held possession of the lands under this contract until the fall of 1908, having up to that time paid $807 on the purchase price, and leaving then due and unpaid the principal sum of $2,700, with five years'

[1]Reported in 174 Pac. 13.

accumulated interest, making a total of more than the original purchase price. Respondents being dissatisfied with this condition, demanded of appellants their money or the land; and here the parties differ as to just what took place. But giving the appellants the benefit of the doubt, it appears that the bond for a deed or contract passed into the possession of respondents, who surrendered the notes to the appellants, and at once entered into the possession of the land, and have ever since been in the undisputed possession, claiming full legal and equitable title as against the appellants and all the world, and have paid the taxes since so taking possession.

The appellants now contend that the respondents are nothing more than mortgagees in possession, seek an accounting of the rents and profits, and offer to pay the balance found to be due upon the purchase price after the crediting of the rents and profits.

While it has been said by this court in *Taylor v. Interstate Inv. Co.*, 75 Wash. 490, 135 Pac. 240, that the seller, under a bond for a deed, retains the title to secure the payment of the purchase money, and may be likened to a mortgagee, yet that cannot help the appellants in this case, because the respondents did not take possession as such mortgagees. When the contract was taken up by the respondents under their demand for the money or the land, and the notes were surrendered, the appellants knew that the respondents were asserting rights which were hostile to them, and such fact, coupled with the change of possession, gave them as complete notice of the hostile claim as can well be conceived. That appellants should have acquiesced in the taking up of the contract and the taking possession of the land for all of the succeeding years until the bringing of this action, can be explained only upon

the theory that, being in default and unable to pay, they willingly surrendered their interest in the land in consideration of the surrender of their notes and the cancellation of their indebtedness.

An executory contract for the sale of land may be rescinded by mutual consent. Such rescission may be oral if there is a sufficient part performance to take it out of the ban of the statute of frauds. *Spinning v. Drake*, 4 Wash. 285, 30 Pac. 82, 31 Pac. 319; *Stoner v. Fryett*, 91 Wash. 89, 157 Pac. 213; *Woolen v. Sloan*, 94 Wash. 551, 162 Pac. 985. In this case, there was full performance, and the oral agreement to rescind was fully executed by the surrender of the contract upon the one hand, and of the notes upon the other, followed by the change of possession. The appellants' interest in the land wholly ceased upon such surrender and abandonment of their interest in the land.

The judgment of the trial court is abundantly supported by the evidence, and must be affirmed.

MAIN, C. J., PARKER, MITCHELL, and FULLERTON, JJ., concur.

[No. 14811. Department Two. July 31, 1918.]

J. W. KAHLE *et al.*, *Respondents*, v. INDUSTRIAL LOAN & INVESTMENT COMPANY *et al.*, *Appellants*.[1]

CORPORATIONS—INSOLVENCY—RECEIVERS—COMPLAINT — SUFFICIENCY. A complaint for appointment of a receiver of an insolvent corporation sufficiently shows mismanagement and insolvency, irrespective of the fraud alleged, where $10,000 received had been mostly expended and not accounted for, and with income not exceeding two or three hundred dollars a year, the officers had voted themselves salaries amounting to $750 a month; making a sufficient showing for the appointment of a receiver.

Appeal from an order of the superior court for Kitsap county, French, J., entered October 2, 1917, appointing a receiver, after a hearing before the court. Affirmed.

Carkeek & McDonald, for appellants.

Bronson, Robinson & Jones, for respondents.

MOUNT, J.—This appeal is from an order of the superior court of Kitsap county appointing a receiver for the Industrial Loan & Investment Company, a corporation. The defendants appeal.

They raise two questions, to the effect, first, that the complaint does not state a cause of action; second, that the evidence is insufficient to support an order for a receiver. The action was brought by the respondents, who are stockholders in the corporation. Afterwards, other stockholders joined as parties plaintiff. The complaint alleges, in substance, that, on September 26, 1916, the Industrial Loan & Investment Company was incorporated under the laws of this state by the defendants Peters, Orth and Rochester; that the capital stock

[1]Reported in 174 Pac. 23.

of the company is $50,000, for which each of said defendants subscribed equal shares, agreeing to pay the same as required by the trustees of the company; that the purposes for which the company was formed were the loaning and borrowing of money for interest, together with all other kinds of business or activity in which it might lawfully engage; that the defendants Peters, Orth and Rochester were, by the articles of incorporation, designated to act as the first trustees of the company; that, immediately upon the incorporation of the company, these trustees voted to allow Peters $5,000 for his services in organizing the company, which was credited upon his stock subscription, and to allow defendant Orth $7,000 for a rating bureau to be used by the company; that this $7,000 was credited upon Orth's subscription for the capital stock. The complaint then alleges that the services performed by Peters did not exceed the sum of $250, and that the rating bureau furnished by Orth was of no value. The complaint then alleges that, at a meeting of the trustees, it was agreed that Peters should receive thirty per cent upon all sales of the capital stock of the corporation. It is also alleged that on January 8, 1917, the trustees voted themselves each a salary of $250 per month; that stock was sold by these trustees, who represented that the stock had been fully paid, and that these plaintiffs and other stockholders purchased with that understanding, when in truth and in fact the stock had not been fully paid and was not paid at all except as above stated. It is then alleged that the company had received from various sources the sum of approximately $10,000; that it now has on hand but $2,300, and that large sums of money were wholly unaccounted for; that no books or proper records were kept thereof. The complaint further alleges that, by reason of mismanagement pursued by the officers of

the company, it is threatened with insolvency and is in fact insolvent.

For the purposes of this appeal, we think we may disregard the allegations of the complaint with reference to the subscription and payment for the capital stock as above stated and disregard the fraud therein attempted to be alleged. We think there is sufficient in the complaint to show that the trustees had mismanaged the corporation so that, if it is not already insolvent, it is in imminent danger of becoming so. At the hearing of the case, upon oral evidence and affidavits, we think it was conclusively shown that the total amount received by the company was in the neighborhood of $10,000; that all but about $2,300 of this money had been expended. About $2,000 of it was loaned in the business for which the company was organized. Its total source of income from these loans would not exceed $240 per year, yet the trustees, in addition to expending more than $2,500 in procuring the loans and in promoting sales of the stock, had expended a large amount of the funds which was not accounted for. In addition to this, when the income of the company for a year could not possibly exceed two or three hundred dollars at most, they voted themselves salaries amounting to $750 per month. It is apparent upon the face of the complaint and upon the face of the showing made that these trustees have so mismanaged the company since it has been formed that, if it is not now insolvent, there is no question but that it will necessarily shortly become so, and that the stockholders who have purchased stock and paid money therefor will receive nothing from the corporation unless a receiver is appointed and immediately takes charge of the few assets remaining belonging to the company.

The statute, at § 741, Rem. Code, provides:

"A receiver may be appointed by the court . . .:—
"(2) In an action between partners, or other persons jointly interested in any property or fund; . . .
"(5) When a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights; . . ."

We think there can be no question in this case, especially under the showing made at the hearing, that this corporation is in imminent danger of insolvency, if it is not so at this time. In the case of *Cameron v. Groveland Imp. Co.*, 20 Wash. 169, 54 Pac. 1128, 72 Am. St. 26, we held, under the statute above quoted, that, where the property of a corporation is being mismanaged and is in danger of being lost to the stockholders and creditors through the collusion and fraud of its officers and directors, or mismanagement and waste, courts of equity have inherent power to appoint receivers.

See, also, *Van Horn v. New Western Shingle Co.*, 54 Wash. 117, 103 Pac. 42; *Kennedy Drug Co. v. Keyes*, 60 Wash. 337, 111 Pac. 175.

We are satisfied, therefore, that the trial court properly appointed a receiver. The judgment is therefore affirmed.

MAIN, C. J., HOLCOMB, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14843. Department One. July 31, 1918.]

H. LANSDOWN, *Appellant*, v. ELMER C. HUFF, *Respondent*.[1]

APPEAL—RECORD—AFFIDAVITS. Affidavits on a motion for a new trial cannot be considered on appeal unless made a part of the statement of facts.

PARTNERSHIP—LIABILITY — FACT OF PARTNERSHIP — INSTRUCTIONS. Upon an issue as to defendant's liability as a partner, it is error to instruct that defendant would be liable if plaintiff believed, or had reason to believe, that he was held out as a partner, if no partnership in fact existed and defendant had no knowledge that he was being held out as a partner.

APPEAL—REVIEW — DISCRETION — NEW TRIAL. The granting of a new trial for insufficiency of the evidence cannot be reviewed except for manifest abuse of discretion.

Appeal from an order of the superior court for Chelan county, Grimshaw, J., entered July 2, 1917, granting a new trial, after verdict in favor of the plaintiff, in an action on contract. Affirmed.

Joseph H. Smith and *Hughes, Sumner & Adams*, for appellant.

N. M. Sorenson and *Reeves & Reeves*, for respondent.

TOLMAN, J.—This action was brought by the appellant upon several causes of action, seeking to hold the respondent as a copartner with George H. Strevel, alleging that the respondent and Strevel were, at the time the indebtedness sued upon was contracted, copartners doing business under the name of International Brokerage Company. The case was tried to a jury, resulting in a verdict in favor of the appellant upon each cause of action. A motion for a new trial was made upon all of the statutory grounds, which

[1]Reported in 174 Pac. 21.

motion was by the trial court granted "upon all of the grounds set out in said motion." From the order granting a new trial, this appeal is taken, and the only error assigned is the granting of the motion for a new trial.

Affidavits were presented in the court below with reference to the alleged misconduct on the part of the jury, newly discovered evidence, etc.; these affidavits were not made a part of the statement of facts, but are brought here in the transcript, and, therefore, as has been repeatedly held, they cannot be considered. We cannot review the rulings upon any of the grounds sought to be established by the affidavits.

The trial court, no doubt through inadvertence, failed to instruct the jury as to the rate of interest, and the time from which interest should be figured; and instruction No. 18 is so worded that the jury might have concluded that the appellant was entitled to recover if he or his assignors believed, or had a reasonable right to believe, that the respondent Huff was a partner. We do not think this is the law. No matter how reasonable appellant's belief may have been, if no partnership in fact existed, and Huff had no knowledge that he was being held out as a partner, and did not hold himself out to be such, there could be no liability.

These errors in the instructions justified the granting of the motion for a new trial.

In any event, the seventh ground on which the motion for a new trial was based, "insufficiency of the evidence to justify the verdict," cannot be reviewed by this court unless there was a manifest abuse of discretion. This subject has been discussed so many times by this court that no good end can be served by a further discussion. *Thomas & Co. v. Hillis*, 70 Wash. 53, 126 Pac. 62; *Snider v. Washington Water Power*

Co., 66 Wash. 598, 120 Pac. 88; *McGraw v. Manhattan Co.*, 66 Wash. 388, 119 Pac. 822; *Taylor v. Spokane, Portland & Seattle R. Co.*, 67 Wash. 96, 120 Pac. 889, and cases there cited. We are satisfied that no abuse of discretion is shown.

The order appealed from will be affirmed.

MAIN, C. J., PARKER, MITCHELL, and FULLERTON, JJ., concur.

[No. 14690. Department One. August 1, 1918.]

H. W. DEMUTH *et al.*, *Appellants*, v. ENOCH FAW *et al.*, *Respondents*.[1]

BANKRUPTCY — JURISDICTION — INSOLVENT CORPORATION — CLAIMS AGAINST STOCKHOLDERS. After appointment of a trustee in bankruptcy for an insolvent corporation, creditors making claim against stockholders on their unpaid stock subscriptions must wage their causes in the bankruptcy proceeding, the Federal courts being vested with exclusive jurisdiction, and the trustee being charged with the duty of reducing unpaid stock subscriptions, if necessary, for the benefit of creditors.

SAME—RIGHTS OF CREDITORS—CLAIMS. Creditors must file their claims with the trustee, and seek protection by appeal to the referee, rather than prosecute independent actions because of dissatisfaction with the trustee's acts.

COURTS—JURISDICTION—RELIEF. Where the state court had no jurisdiction of claims against a bankrupt, it must dismiss the cause without attempting to determine the merits which were exclusively within the jurisdiction of the Federal court.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered September 21, 1917, in favor of the defendants, on granting a nonsuit, after a trial to the court. Modified.

Chas. W. Johnson, for appellants.

B. B. Horrigan and *Gerard Ryzek*, for respondents.

[1]Reported in 174 Pac. 18.

MITCHELL, J.—Appellants, plaintiffs below, sue respondents on alleged unpaid stock subscriptions to the capital stock of the Pasco Theatre Company, a corporation which was organized in 1914. After the capital stock was subscribed, the corporation proceeded in the erection of a theater building. Appellants furnished labor or material, or both, in the construction of the building. In January, 1915, the Pasco Theatre Company filed its petition in voluntary bankruptcy in the Federal court and was adjudged a bankrupt. A trustee was appointed and qualified and notice to creditors duly given, to the knowledge of appellants, who have not filed their claims in the bankruptcy proceeding nor appeared therein in any manner. The bankrupt has not been discharged. The trustee in bankruptcy is still acting. There has been some litigation by the trustee against respondents, or part of them, with reference to their liability as stockholders, now alleged by appellants to have been amicable and without good faith, which, however, we think is immaterial. Appellants put their claims in judgment in the superior court and have been unable to collect from the corporation. Respondents answer separately by denials, and affirmatively plead the pendency of another action, or some former judgment, involving the same subject-matter, or both. Appellants counter such affirmative matter by denials; and upon the issues thus made, a trial was had, and at the conclusion of appellants' proof, on motion of respondents, the court granted a nonsuit, favoring all the respondents, with prejudice as to all except Kerfoot. Plaintiffs appeal.

Appellants should and must wage their causes in the bankruptcy proceeding. The Federal courts are invested with original jurisdiction in bankruptcy matters, and this jurisdiction is exclusive of the state courts.

See Loveland on Bankruptcy (3d ed.), § 18, page 91; and cases cited.

As to the reach of the trustee, and that he represents creditors, there is no question that it is his duty to reduce unpaid stock subscriptions, if necessary, for the benefit of all the creditors.

In *Benner v. Scandinavian American Bank,* 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914D 702, this court said:

"But the trustee [in bankruptcy] not only holds the legal title to the bankrupt's estate, *but he represents the creditors of the bankrupt also.* . . . The bankruptcy proceedings are in themselves in effect an attachment and sequestration of the property of the bankrupt for the benefit of his creditors, and the trustee thereof has plenary power to take all such steps as are necessary to subject the bankrupt's property to the satisfaction of his obligations."

Also, see 7 R. C. L., page 387, as follows:

"Unpaid subscriptions are assets which a corporation may assign like any other chose in action, and they will pass to the assignee under a general assignment for the benefit of creditors. Unpaid *subscriptions also pass by a decree in bankruptcy or insolvency of the corporation to the assignee or trustee who represents both corporation and creditors, and who is entitled to enforce the liability of the stockholders.*"

Appellants challenge the manner in which the trustee in bankruptcy has been discharging his duties, submitting that in partial support of this action in the state court; but the trustee is not here to be heard on such charges; and besides, appellants, by their pleadings and proof, show they have never sought the help of the trustee, having even refused to file their claims as by law required. A creditor may not stand aloof from the bankruptcy proceedings because dissatisfied with the trustee's administration, for there is ample provision in the bankruptcy act for his protection by appeal to

the referee, and, further on, to the judge of the court, if necessary. Loveland, Bankruptcy (3d ed.), § 32a, page 141.

The trial court was right in denying relief to appellants, but it went too far in attempting to pass on the merits of the affirmative defenses. As soon as it appeared to the court, as it did, that the corporation had already been adjudged a bankrupt and its affairs were being handled by a trustee under the directions of the Federal court, it should have simply dismissed the cause without attempting to determine the merits of a controversy exclusively within the jurisdiction of that court.

There are some incidental or minor grounds of error claimed by appellants which are not specifically noticed by us because they give way under our disposition of the principal question discussed.

The cause is remanded with directions to modify the judgment as herein indicated.

Respondents will recover their costs in this court.

MAIN, C. J., FULLERTON, PARKER, and TOLMAN, JJ., concur.

[No. 14762. Department One. August 1, 1918.]

A. DOBER, *Respondent*, v. ANNA DOBER, *Appellant*.[1]

DIVORCE—ALIMONY—DIVISION OF PROPERTY. In an action for divorce, an award of $5,660 as permanent alimony and in lieu of dower rights is inadequate, and will be increased to $10,000, where it appears that defendant had separate property of the value of sixty to eighty thousand dollars, readily convertible, and a large income from mining interests.

Appeal from a judgment of the superior court for Benton county, Truax, J., entered September 17, 1917, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Modified.

H. M. Pelham and *Moulton & Jeffrey*, for appellant.

Andrew Brown and *Thomas H. Wilson*, for respondent.

TOLMAN, J.—This is an appeal from a judgment and decree entered by the trial court granting a divorce to the respondent, settling property rights, and awarding to the appellant the sum of $5,660 in lieu of her dower rights in certain Michigan property and as permanent alimony.

The questions involved are purely questions of fact. The record is very voluminous, and no intelligent statement of the facts can be made within reasonable limits.

We have examined the record with great care and are thereby convinced that the trial court reached the correct conclusion upon all of the issues in the case except the financial one. The respondent appears to have separate property of the value of from sixty to eighty thousand dollars, a considerable portion being money in bank and securities readily convertible. In addition, he appears to enjoy what might be called a large in-

[1]Reported in 174 Pac. 14.

come from his mining interests in Michigan, though this income is not fixed, and its extent and duration are somewhat uncertain. After careful consideration of all the facts, and having in mind the needs of the respective parties, we have reached the conclusion that the decree should be modified so as to increase the lump sum awarded to the appellant from $5,660 to $10,000. In all other respects the judgment of the trial court will be affirmed.

The appellant will recover the costs of this appeal.

MAIN, C. J., FULLERTON, PARKER, and MITCHELL, JJ., concur.

[No. 14769. Department One. August 1, 1918.]

W. J. WARREN, *Respondent*, v. MARTIN NORGUARD *et al.*, *Appellants*.[1]

MASTER AND SERVANT—RELATION — PERSONAL INJURIES — AUTOMOBILES—LIABILITY TO THIRD PERSONS. The owners of an automobile are not liable for personal injuries to a pedestrian, struck when the car was driven by a son who had taken it for his own pleasure without permission and who was not a member of the family, and was not in any sense the agent or servant of his parents; and it is immaterial that, in the course of his rounds, he had picked up and was conveying a minor brother who was a member of the family.

Appeal from a judgment of the superior court for King county, Smith, J., entered October 13, 1917, upon findings in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile, after a trial on the merits to the court. Reversed.

Jno. W. Arctander, for appellants.

George F. Hannan and *C. A. Brinkley*, for respondent.

[1]Reported in 174 Pac. 7.

FULLERTON, J.—The respondent, Warren, while upon one of the streets of the city of Seattle, was injured by being struck by an automobile owned by the appellants Norguard, but which, at the time, was driven by one of their sons with whom another son was riding. This action is to recover for the injuries suffered. It was tried to the court sitting without a jury. The court found, among others, the following facts:

"(2) That on, to wit, the 3d day of May, 1916, the children of said defendants, Omar Norguard and Martin Norguard, Jr., acting as the agents and servants of said defendants, were driving an automobile belonging to said defendants, west on Olive street in the city of Seattle, King county, Washington . . .

"(5) That the automobile which struck the plaintiff . . . was purchased by the defendants Martin Norguard and Alma J. Norguard, both for business purposes and for use of themselves and their children for pleasure purposes, and at the time of the injury to plaintiff it was being driven by said children with the consent and permission of said defendants for the purpose for which it was purchased and used."

On the findings, the court held the appellants liable for the injury, and entered a judgment against them in the sum of $578.

The facts, as we gather from the record, are in substance these: The appellants were engaged in the business of cleaning and pressing clothes, and purchased the automobile in question for both business and pleasure purposes. Their family consisted of three sons, one of whom was a young man twenty-five years of age, and the other two were minors. The minor sons were a part of the appellant's family and lived at the family residence. The elder son was engaged in his own pursuits, not having lived at the family home for more than six years. At the time of the accident, he was in service on a steamer engaged in the coastwise trade,

and had his clothes and all of his paraphernalia on board the boat, which was then his home in so far as he had a home. On the day of the accident, he had just returned from a cruise, and, going to the family home, found the family absent. The car was in the garage, and he took it and drove it for a while around the streets, when, meeting one of his brothers, he took him in the car and started to drive back to the family residence. On the way back, he ran against the respondent with the car, causing the injury which gave rise to this action. It was shown that this son had registered under the conscription act, giving his parents' home as his place of residence, and had directed that his mail pertaining thereto be sent to that address; that he sometimes when in port stayed at the home over night, and at other times visited there, perhaps eating a meal in the house, but as often slept either aboard the boat or at some hotel in the city. No part of his earnings were applied to the uses of the appellants but they were used wholly for his own benefit. Other circumstances were also shown, such as that he had, at his father's request, taken out the licenses for the automobile, and had been licensed by the city of Seattle to drive the particular machine. While it was said by the appellants that this son had never been given permission to drive the machine and that they did not know he had the city license, we think it inferable that he had never been denied the privilege, and that he himself felt that he was privileged to do so when the car was not in use for family purposes.

It is our opinion that this evidence, giving it the most favorable interpretation, does not justify the findings or judgment of the trial court. As we said in *Birch v. Abercrombie,* 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821, 50 L. R. A. (N. S.) 59, a parent is not liable for the torts of his child, even when driving an

automobile belonging to the parent, solely on the ground of relationship, but the liability, if any exists, must rest in the relation of agency or service. It may be that the relation of agency or service will be conclusively presumed where the automobile is purchased for the use of a family all residing together in the common home, or where an adult child, not a part of the immediate family, drives it at the request of the parent, or on some business pertaining to the affairs of the parent; but the facts in the instant case do not meet either of these conditions. There was here no relationship of agency or service. The automobile was not being driven on any business or for the pleasure of the appellants or their family. The most that is shown is that the adult son was driving the car for his own pleasure with his parents' consent. But this does not create liability on the part of his parents for his tortious acts while so doing. Not being a member of his parents' family, he stood with relation to his parents as any stranger would stand, and it is not the rule that the owner of an automobile who consents that another may drive it for that other's pleasure becomes liable for that other's tortious acts committed while so driving it. In other words, the son was not in this instance the agent or servant of his parents, and no such relation existed between them that agency or service can be presumed.

The trial court found, it is true, that the automobile was, at the time of the accident, driven by the "children" of the appellants, basing the finding no doubt upon the fact that the son taking the car from the garage had in the course of his rounds picked up his younger brother and was driving him to his parents' home. But we cannot think the finding justified by this fact. Manifestly, if no relation of agency and service arose between the adult son and his parents from the

original taking of the automobile, that agency would not be created because he took into the car before his return a member of the appellants' family. What the relation would have been had it been shown that the taking in of the brother was at the request of the parents we need not consider, as the record does not present the question.

The judgment is reversed, and the cause remanded with instructions to enter a judgment for the defendants below.

MAIN, C. J., TOLMAN, MITCHELL, and PARKER, JJ., concur.

[No. 14894. *En Banc.* August 1, 1918.]

THE STATE OF WASHINGTON, *on the Relation of C. D. Hillman et al., Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Everett Smith, Judge, Respondent.*[1]

APPEAL—DECISION — JUDGMENT ON REMITTITUR — EFFECT—POWER TO VACATE. Where the judgment of the supreme court on appeal directed the making of certain conveyances and the doing of certain things within a specified time, or in the alternative, a money judgment, the final judgment of the superior court after remittitur, determining the sufficiency of the conveyances and whether or not the other things required had been done, is the judgment of the superior court which that court had jurisdiction to vacate on petition without first obtaining leave from the supreme court.

Application filed in the supreme court June 24, 1918, for a writ of mandate to the superior court for King county, Smith J., to compel a hearing. Granted.

Wilson R. Gay and *George H. Rummens*, for relators.

Aust & Terhune and *Byers & Byers*, for respondent.

[1]Reported in 174 Pac. 14.

PARKER, J.—The relators, Hillman and wife, seek a writ of mandate from this court to compel the superior court for King county to hear and dispose of their petition filed in that court, wherein they pray for the vacation and setting aside, upon the ground of fraud in procuring the same, of the final judgment and decree rendered in the case of *Gordon v. Hillman*, 91 Wash. 490, 158 Pac. 96, carrying into effect the original decree entered therein which was affirmed by this court.

The questions here presented are whether or not the final judgment and decree so sought to be set aside is, in effect, a decree of the superior court instead of this court, enabling the superior court to entertain the petition without leave of this court; and whether or not the superior court has refused to entertain relators' petition.

In July 1913, Gordon and wife commenced an action in the superior court for King county against Hillman and wife, seeking rescission of an exchange of certain properties, and reconveyance of such properties by each to the other, upon the ground of fraud practiced by the Hillmans, inducing the Gordons to consummate the exchange. That action resulted in a decree rendered by the superior court for King county on February 27, 1914, in favor of the Gordons, substantially as prayed for by them. In so far as we need here notice its terms, that decree reads as follows:

"It Is Hereby Ordered, Adjudged and Decreed that the defendants within thirty days from the date of the entry of this decree, reconvey to plaintiffs by special warranty deed . . . [property] . . . or in default of reconveyance of the last described property, that plaintiffs have judgment against the defendants and each of them for the sum of $37,000; and also . . . [property] or in default of reconveyance of last described property, that plaintiffs have judgment against

the defendants and each of them for the sum of five thousand dollars ($5,000); and also execute a bill of sale of . . . [property] or in default of reconveyance of said property that plaintiffs have judgment against the defendants and each of them in the sum of twenty-five hundred dollars ($2,500) . . .

"Ordered, Adjudged and Decreed that within thirty days from the date of the entry of this decree and forthwith upon reconveyance by the defendants as above set forth, the plaintiffs reconvey to the defendants by special warranty deed, the following described property to wit . . . [property].

"All said conveyances to be made subject to the liens or incumbrances existing upon or against the above described properties or any of them on the 7th day of July, 1913 . . . and also subject to all taxes or assessments subsequently accrued against said real property or any part thereof. . . .

"Ordered, Adjudged and Decreed that within thirty days from the date of the entry of this decree, or within thirty days of the filing of the remittitur herein in the event that this cause is appealed to the supreme court, and forthwith upon reconveyance by defendants as above provided, that the plaintiffs repay to the defendants the sum of $4,369.01, said principal representing sums expended by the defendants upon properties conveyed by plaintiffs to defendants and herein directed to be reconveyed."

The Hillmans appealed from that decree to this court. It was affirmed by our decision in *Gordon v. Hillman*, 91 Wash. 490, 158 Pac. 96. Thereafter, on January 5, 1918, upon a hearing in the superior court for King county looking to the carrying into effect of this affirmed decree, that court entered its further final decree, which, so far as we need here notice its terms, reads as follows:

"This cause came on for hearing on the application of the plaintiffs for a decree to carry into effect the decree heretofore made by this court and affirmed by the supreme court of the state of Washington, and

"It appearing that the plaintiffs in the above entitled action have paid into court the sums specified in the final decree of this court made on the 27th day of February, 1914, and

"It further appearing that they have tendered into court the special warranty deed provided for in said decree, and

"It further appearing that the defendants in the above entitled action have not, within the time required in the original decree herein, made or tendered to the plaintiffs, or tendered into court, the deeds specified in said decree . . .

"It further appearing that the said decree hereinbefore referred to provided that in case of failure of the defendants to convey to plaintiff . . . [property] the plaintiffs should be entitled to judgment against the defendants for the sum of thirty-seven thousand ($37,000) dollars and that in the event of the failure of the defendants to convey to plaintiffs . . . [property] then the plaintiffs should be entitled to a judgment against the defendants for the sum of five thousand dollars ($5,000), and

"It further appearing that in the event of the failure of the defendants to convey to plaintiffs . . . [property] the plaintiffs should have judgment against the defendants for the sum of twenty-five hundred ($2,500) dollars, and

"It further appearing that the defendants have not within the time provided in the original decree herein, made any of the last three mentioned conveyances to plaintiffs it is therefore

"Ordered, Adjudged and Decreed that the plaintiffs do have and recover from the defendants the sum of forty-four thousand five hundred dollars ($44,500) together with interest thereon at the legal rate from May 5, 1917."

Thereafter in May, 1918, the Hillmans filed in the superior court for King county their petition, seeking the setting aside of the final judgment and decree entered on January 5, which is the decree last above quoted from, on the ground of fraud and misrepresenta-

tion on the part of counsel for the Gordons in procuring the same to be entered. Upon the filing of that petition, counsel for the Hillmans caused summons to be issued and personal service thereof to be made, such as to give the superior court jurisdiction to hear and entertain the petition in so far as service of process was necessary. Thereafter counsel for the Gordons specially appeared and objected to the superior court's entertaining the petition on the ground of want of jurisdiction in the court so to do, in that it was in effect a petition to vacate and set aside a decree of this court, and no permission had been granted by this court to the superior court to entertain such petition.

The answer made by Judge Smith to relator's petition for a writ of mandate, we think, shows that he refused to entertain relators' petition and take jurisdiction over the controversy therein presented because he was of the opinion that to do so would be to entertain a petition to vacate and set aside what is, in effect, a decree of this court. His answer is not as certain in this respect as it might be, since he seems to therein point out some reasons touching the merits of relators' petition, why it should not be granted; but we think, reading his answer as a whole, that it amounts to a showing that he refused to entertain such petition, either upon the merits or as to its stating good cause for the vacation of the final judgment and decree.

Is the final judgment and decree of January 5, 1918, a judgment and decree of the superior court, or was it, in effect, a judgment and decree of this court, because entered with a view to carrying into effect the original decree which had been affirmed by this court, which thereby in effect became a decree of this court? In view of the fact that the original decree, while it determined the rights of the parties, or rather the basis on which the rights of the parties should be adjusted, was

not in its practical effect a final decree, leaving nothing to be further determined, but necessarily left open for determination by the superior court, upon the remittitur going down, the question, among others, of the sufficiency of the conveyances to be made and tendered by the respective parties in the final adjustment of their rights in compliance with the original decree. One of the grounds of fraud and misrepresentation charged is, in substance, that the conveyances tendered by the Gordons were not such as to effectually protect the rights of the Hillmans under the original decree, and that fraud was practiced, inducing both the court and the Hillmans to believe that the tendered conveyances were such as to effectually protect the rights of the Hillmans, thus inducing the court to enter the final judgment and decree sought to be set aside. Manifestly, there could be and was presented upon that hearing the question of the sufficiency of such conveyances, which the court was called upon to decide, and as to which fraud could be practiced upon the court, inducing a wrong decision; furnishing relators' cause for relief such as they in their petition and their application to this court are seeking.

We conclude that the judgment and decree of January 5, 1918, sought to be vacated and set aside is a judgment and decree of the superior court in so far as it determined the sufficiency of the conveyances to be made, and also in so far as it determined whether or not the other things required to be done by the decree had been done, and that upon the filing of relators' petition in the superior court and the service of the summons as alleged and admittedly made, it was the duty of the superior court to entertain the petition and proceed to a final determination thereof. Our decisions in *State ex rel. Gordon v. Smith,* 98 Wash. 100, 167 Pac. 91, and *Gordon v. Hillman,* 102 Wash. 411, 173 Pac.

22, constitute a part of the history of the controversy between the Gordons and the Hillmans over these properties, and are of some interest in connection with this application.

It is ordered that a writ of mandate issue, directing the superior court for King county and Judge Smith to proceed as herein indicated.

MITCHELL, MOUNT, HOLCOMB, MACKINTOSH, and TOLMAN, JJ., concur.

[No. 14594. Department Two. August 3, 1918.]

THE CITY OF SEATTLE, *Appellant*, v. GREAT NORTHERN RAILWAY COMPANY *et al.*, *Respondents*.[1]

INDEMNITY—PERSONAL INJURIES—CONTRACT TO SAVE HARMLESS—CONTRIBUTING TO INJURY—JOINT TORT FEASORS. A city cannot recover over from a railroad company, bound to save the city harmless from damages caused by the construction of a tunnel, on account of a judgment for personal injuries sustained on a defective sidewalk, alleged to be caused by the construction of the tunnel, if the city contributed to the injury by faulty construction of the sidewalk or by knowingly maintaining a defect in a city street, since either would be an independent act of negligence by the city, making it a joint tort feasor and not entitled to recover from the railroad company (MAIN, C. J., and MACKINTOSH, J., dissent).

Appeal from a judgment of the superior court for King county, Sheeks, J., entered June 15, 1917, upon findings in favor of the defendants, in an action to recover over the amount of a judgment for personal injuries, after a trial on the merits to the court. Affirmed.

Hugh M. Caldwell and *Patrick M. Tammany*, for appellant.

C. H. Winders, *F. V. Brown*, and *F. G. Dorety*, for respondents.

[1]Reported in 174 Pac. 4.

HOLCOMB, J.—In 1903, Seattle granted a franchise to the Northern Pacific Railway Company and the assignor of the Great Northern Railway Company, granting them the right to construct, maintain and operate a railway tunnel underneath the city. It is admitted by the pleadings that the tunnel franchise was granted subject to a covenant by the grantees to save the city harmless from all claims, actions, or damages of every kind which might accrue or be caused by the tunnel, and binding the grantees to pay any judgment rendered against the city by reason of the negligent or defective construction, maintenance and operation. The tunnel was completed in 1905. After casting of the cement work, there remained a space of from three to six feet between the concrete arch and the top bore of the tunnel. This space was back-filled with old timbers and cordwood which commenced to decay, with consequent settlement. There were three periods of settlement—construction period, decay of timber back-fill period, and repair period, with resulting disturbance to adjacent buildings, pavement, sidewalks, and curb on the east and west sides of Fourth avenue parallel with the tunnel. In 1907, Fourth avenue was regraded, and in 1909, cement sidewalks were laid in accordance with the plans and specifications of the city engineer's office.

On May 31, 1912, Mrs. Bigford, while walking along Fourth avenue, fell over an abrupt or perpendicular break or rise of two inches' height in the sidewalk at a point twelve feet north of the intersection of Spring street. She alleged in paragraph 4 of her complaint, "that the city in preparing the sidewalk for traffic so constructed the same or permitted the same to become defective." The jury awarded her a verdict and a judgment was entered thereon against the city for $2,293.40. This action was brought by it against re-

spondents to recover over the amount paid by it in satisfaction of the judgment, claiming that the defect which caused Mrs. Bigford's injury was caused by the negligent construction and maintenance of the railway tunnel which runs under that corner, and that it had notified respondents of the pendency of that action. Appellant introduced the judgment roll in the Bigford case, and supplemented this with an attempt to show that respondents were responsible for the defect and that it was caused by settlements on account of the decay of the wood back-fill above the arch of the tunnel. Judgment of dismissal was entered, and the city appeals.

Appellant assigns, among other claims, that the court erred in refusing its proposed findings of fact; in not entering judgment in its favor; in making the third and fourth findings of fact; in making the first conclusion of law, and entering judgment of dismissal. All are determined by the determination of the question of the independent negligence and liability of the city.

The city was primarily liable for consequential injuries caused by negligently maintaining a defective sidewalk. Thus, the main questions are, (1) was the defect of the sidewalk in the Bigford case the same as that here involved; (2) was the injury caused by an independent negligent act of the city in constructing the defective sidewalk or allowing it to become and remain defective; (3) was the defect in the sidewalk caused by the settlements on account of respondents' tunnel.

The claim agent for the city, who testified in the Bigford case and the present one, established the uncontroverted identity of the defect. Faulty construction and knowledge of the defect in the sidewalk was an issue in the Bigford case. The jury returned a general verdict against the city. Faulty construction of

the sidewalk would constitute an independent act of negligence as far as respondents are concerned. Knowingly maintaining a defect in a public street is an independent act of negligence of the city. The rule governing is to be found in *Tacoma v. Bonnell,* 65 Wash. 505, 118 Pac. 642, Ann. Cas. 1913B 934, 36 L. R. A. (N. S.) 582, and in *Puyallup v. Vergowe,* 95 Wash. 320, 163 Pac. 779, in the former of which it is said:

"If a public street is maintained by the city in an unsafe or dangerous condition, and the negligence of a third party combines with that of the city to cause an injury to such third party, and such injury would or might not have occurred but for the combined negligence of the city and the second party, no recovery by either of the joint wrongdoers may be had against the other."

If the city contributed to the injury by construction of a defective sidewalk or permitting the defect to exist for an unreasonable length of time without repairing, it cannot recover from a joint tort-feasor.

There was some evidence that to the tunnel is to be attributed the settlements of buildings along the route of the tunnel, but we cannot infer from this that the particular defect in the sidewalk was caused that way.

We cannot escape the conclusion that the city has failed to prove its case. The judgment is affirmed.

MOUNT and CHADWICK, JJ., concur.

MAIN, C. J., and MACKINTOSH, J., dissent.

[No. 14695. Department Two. August 3, 1918.]

STATE FINANCE COMPANY, *Respondent*, v. THOMAS B. MOORE *et al.*, *Appellants*.[1]

MORTGAGES—FORECLOSURE—PARTIES—REAL PARTY IN INTEREST—ASSIGNEE OF MORTGAGE. Under a written assignment of a mortgage, the assignee, which was a subsidiary corporation of the mortgagee, may sue to foreclose the mortgage as the real party in interest, since the judgment will bind the mortgagee and the defendants are entitled to all defenses they might have made against the mortgagee.

BILLS AND NOTES—DISCHARGE—MAKERS AS OWNERS—RIGHTS OF THIRD PARTIES—STATUTES. The makers of a note who became the owners before maturity and put it up as security for a bond issue are not discharged by the operation of Rem. Code, § 3509, providing for the discharge of the principal debtor who becomes the holder of the instrument at or after maturity; since the statute does not apply as to a person not a party to the instrument where the principal debtors admit it is still in force, and since the makers, though owners, were not the holders and became owners before maturity.

MORTGAGES—FORECLOSURE—CONVEYANCE SUBJECT TO MORTGAGE PLEDGED AS COLLATERAL—JUDGMENT—AMOUNT. The purchasers of mortgaged property subject to the mortgage must be assumed to have deducted the amount of the mortgage from the purchase price; and upon foreclosure of the mortgage by an assignee holding the same as collateral security for less than its face, the judgment of foreclosure should be for the full amount of the mortgage debt, and not limited to the amount for which it was pledged, for the protection of the former owner of the mortgaged premises, though he had become owner of the mortgage pledged; since he conveyed the premises subject to the mortgage anticipating to be recompensed by receiving the face of the mortgage debt less the indebtedness for which it was pledged.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered December 13, 1917, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Affirmed.

[1]Reported in 174 Pac. 22.

E. O. Connor and *Mulligan & Bardsley,* for appellants.

Hamblen & Gilbert and *Graves, Kizer & Graves,* for respondent.

MACKINTOSH, J.—The plaintiff is foreclosing a real estate mortgage. The facts in connection with it are as follows: In 1913, the defendants Birch executed a note and second mortgage to the Traders' National Bank, of Spokane, in the sum of $72,000, the mortgage being upon the property known as the Tokyo Apartments, in Spokane. These instruments were executed to one Gates, as trustee for the bank, and by him reconveyed to the Spokane & Eastern Trust Company, with which the Traders' National Bank consolidated subsequently to the original transaction between the Birches and Gates. The Spokane & Eastern Trust Company thereafter assigned the note and mortgage to the State Finance Company, a subsidiary of the Spokane & Eastern Trust Company, and the plaintiff herein. On September 24, 1915, the plaintiff commenced this action. Subsequently to the transaction between the Birches and Gates, but prior to the commencement of the foreclosure action, several transfers of the Tokyo Apartments were made:

(1) October 1, 1913, deed of Birches to defendants Swager. Consideration, $10.

(2) March 8, 1915, deed of defendants Swager to defendant Lizzie S. Gerhauser. Consideration, $10.

(3) January 29, 1916, deed of defendant Gerhauser to appellants Moore and wife. Consideration, $1.

The first two of these instruments contain clauses assuming and agreeing to pay the existing indebtedness of $72,000 against the property, and the last instrument provided that the appellants Moore took the property "subject to valid mortgage now on record." It will be

noted that the conveyance of defendant Gerhauser to appellants Moore and wife was made after the commencement of the action to foreclose, and subsequently to the taking of default against Gerhauser in that action. At the time of the commencement of the action, a notice of *lis pendens* was duly filed in the auditor's office. During 1913 and 1914, transactions were had between the Birches and the Spokane & Eastern Trust Company whereby a bond issue to the Birches was made by the Trust Company, part of the security for which was the note and mortgage in question, which had in the meantime become the property of the Birches. In the matter of the bond issue, various transactions between the Birches and the Trust Company reduced the former's indebtedness to $37,500. At the foreclosure sale, the plaintiff bid in the mortgaged premises for the sum of $89,000, holding the difference between that sum and the Birches indebtedness "as trustee for and on behalf of Seymour Birch and wife."

Four claims of error are made:

I. The first relates to a question of amendment of the pleadings, and in disposing of this assignment it is unnecessary to say more than that, after a thorough consideration of it, we see no merit therein.

II. That the plaintiff has not capacity to sue, not being the real party in interest. The plaintiff in this case is suing under a written assignment, and the defendants were entitled to all of the defenses as against this plaintiff that they would have been entitled to against the Trust Company, and the judgment will bind the Trust Company as well as the plaintiff. We see no valid objection to the action being prosecuted in this way.

III. It is claimed that the note was discharged by operation of law because the Birches, the makers thereof, had become the owners of the note, and were the

owners thereof at the time they put it up as security for the bond issue in 1914. Appellants' argument on this point is based upon Rem. Code, § 3509, which provides that a negotiable instrument is discharged when the principal debtor becomes the *holder* of the instrument *at or after maturity* in his own right. This statutory provision is only intended for the protection of parties to the instrument. As to a person who is not a party thereto and against whom no liability can be enforced in an action upon the instrument, the instrument has not been discharged when the parties to it, the principal debtors, admit that it is still in full force and effect. Moreover the record shows that the Birches were not the *holders* of the note but the owners thereof, and the statute grants a discharge only to the *holder*. The record further shows that the Birches became the owners of the note *before maturity* and the statute only discharges the obligation when the principal debtor becomes a holder *"at or after maturity."* For these reasons, we see no merit in this assignment of error.

IV. The appellants complain because the court rendered judgment in excess of the sum of $37,500, with interest, the amount for which the note was held as collateral security, and insist that, if a foreclosure is allowed, it should be for only the amount actually owing by the Birches to the Trust Company. It seems to be the law in this state since the decision in *Ault v. Blackman,* 8 Wash. 624, 36 Pac. 694, that the purchaser of mortgaged premises who purchases them subject to the mortgage and does not assume and agree to pay the mortgage has the right to question the validity of and consideration for the mortgage. But this rule does not extend to, and in the case referred to it is clearly indicated that it was not expected to extend to, the granting to a purchaser of mortgaged premises who has

bought subject to the mortgage, the amount of which was deducted from the purchase price which he paid, the right to question the consideration for or validity of such mortgage. It would be palpably unjust for the appellants who have received the benefit of the deduction of the face amount of the mortgage in purchasing the property to be able to reduce the amount to $37,500. This was not what was sold them by their grantor, nor purchased by them. It would be unconscionable to allow the appellants to reduce the recovery from the amount stipulated in the mortgage to $37,500; for the Birches, when they originally sold the property, deducted from the purchase price that they received the amount of the mortgage, anticipating that they would be subsequently recompensed for that amount by receiving the difference between the amount of their debt due to the bank and the face amount of the mortgage. To obliterate that difference now would be taking some $30,000 or $40,000 out of the pocket of the Birches, who have paid for it, and putting it in the pocket of the appellants, who have paid nothing for it. We are justified in assuming, and in fact are compelled to, that the appellants, when they received the conveyance to them, deducted from the purchase price which they paid the amount of the mortgage. No testimony was introduced by the appellants as to the price paid by them and the conveyance they received states a nominal consideration of one dollar. With the record in that shape, the authorities hold a conveyance subject to a mortgage is presumed to have included the mortgage debt in the purchase price. 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1205; *Atherton v. Toney*, 43 Ind. 211. The situation is well expressed in respondent's brief as follows:

"If appellants were now permitted to defeat a recovery of the face of the mortgage, and it were held

that plaintiff could only recover the $37,500 actually owing to the Spokane & Eastern Trust Company, the Birches, who had sold the mortgaged premises at a price fixed upon the theory that there was a $72,000 second mortgage against it which was a valid charge upon the realty, would be defrauded out of the difference between the amount of their indebtedness to the Trust Company and the face of the mortgage sued upon, and the appellants, who had purchased the land at a price fixed on the basis of the mortgage being for $72,000, would secure, without consideration, the benefit of the scaling down of the mortgage. This would be a fraud upon the Birches without any fault upon their part and a premium given to the appellants without their having done anything to earn it. When appellants' counsel, then, say that to permit a recovery of the $72,000 would be to make Birch a present of $40,000, they entirely misconceive the effect of the transaction. On the contrary, to scale down the recovery to $37,500 would be to make appellants a present of $40,000. The Birches are entitled to the $40,000 because when they sold the property that amount was taken out of the purchase price. The appellants are not entitled to the $40,000 because when they bought the property they bought it at a price which took into account the $40,000 as an enforceable lien against the property."

In the absence of proof to the contrary, the appellants must be held to have received the benefit of the full amount stated in the mortgage, and are now estopped to question the foreclosure in that amount.

For the reasons stated, the judgment will be affirmed.

MAIN, C. J., HOLCOMB, MOUNT, and PARKER, JJ., concur.

[No. 14702. Department Two. August 3, 1918.]

UNITED STATES FIDELITY & GUARANTY COMPANY, *Respondent*, v. AMERICAN SAVINGS BANK & TRUST COMPANY, *Appellant*, F. W. MCDONALD *et al.*, *Respondents*.[1]

GUARANTY—CONTRACTOR'S BOND—LOAN TO CONTRACTOR—CONSENT OF SURETY—LIABILITY. A letter from a contractor's surety consenting to an assignment of bonds, to be held "as collateral security only for a loan" to the contractor, is not a guaranty of payment of the loan on failure of the security through default of the principal.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACT. Where contractors for a street fill did not make part of the fill, which was done by a street railway company as required by its franchise, they are not entitled to pay therefor, under a contract which provided that the city engineer or board of public works shall have the right to eliminate any of the items called for in the contract, and such changes shall not constitute a claim for loss of anticipated profits.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 22, 1917, upon findings in favor of the defendant guaranty company, in an action on contract, tried to the court. Affirmed.

Farrell, Kane & Stratton, for appellant.

Hugh M. Caldwell and *Robert H. Evans*, for respondent City of Seattle.

McClure & McClure, for respondent United States Fidelity & Guaranty Company.

MOUNT, J.—In October, 1915, the city of Seattle let a contract to the defendants, McDonald & Jones, for the improvement of Twenty-fourth avenue south, and other streets in the city. This contract was the usual

[1]Reported in 174 Pac. 6.

local improvement form contract, providing for the payment, upon the city engineer's estimates, of seventy per cent of the amount earned as the work progressed and the retention of thirty per cent of the contract price until payment of all claims and charges incurred in performing the work. The United States Fidelity & Guaranty Company became the surety on this contract, executing a bond in the full sum of the contract price, conditioned upon the faithful performance of the work by the contractors. Both the contract and the bond were filed in the office of the auditor of King county. Thereafter, McDonald & Jones began the improvement and continued until the work was fully performed and accepted. While the work was in progress, McDonald & Jones borrowed money from the American Savings Bank & Trust Company. Before the money was loaned, the bank required McDonald & Jones to get the consent of the surety company for assignment to the bank of bonds issued against the improvement district as security for the repayment of the money. McDonald & Jones thereupon secured the consent of the surety company in the form of a letter which was written by the manager of the company to the American Savings Bank & Trust Company, as follows, omitting the date and letter-head:

"Gentlemen: We have been requested by Messrs. McDonald & Jones to give our consent to the assignment to you of bonds of the face value of six thousand ten and 00-100ths dollars ($6,010) due them on estimates in connection with their contract for the improvement of Twenty-fourth avenue south, et al., by grading etc. We, therefore, hereby give our consent to such assignment of said bonds to an amount not exceeding six thousand ten and 00-100ths dollars ($6,010) face value, said bonds to be held by you as collateral security only for a loan of six thousand ten and 00-100ths dollars ($6,010) to be made by you to

said McDonald & Jones, said assignment and this consent to be effective when said loan is actually made."

Thereupon the bank loaned the money and took an assignment of the bonds. Some $2,000 was collected upon the bonds by the American Savings Bank & Trust Company, and the balance thereof was required to pay claims for material and labor filed against the contractors. It is now claimed by the appellant that this letter was a guaranty of the payment of the money loaned. The trial court concluded that this letter was not a guaranty of the $6,010 loaned by the American Savings Bank & Trust Company to McDonald & Jones, and for that reason refused a judgment against the surety company in favor of the American Savings Bank & Trust Company for the balance due upon the note given by McDonald & Jones.

The appellant argues that the court erred because this letter was in effect a guaranty for the payment of the note. It is apparent, we think, from a reading of the letter itself, that there was no intention on the part of the surety company to guarantee the payment of the note for $6,010 executed by McDonald & Jones in favor of the bank and trust company, for, after reciting that McDonald & Jones had requested the consent for the assignment of the bonds, the letter says:

"We, therefore, hereby give our consent to such assignment of said bonds to an amount not exceeding six thousand ten and 00-100ths dollars ($6,010) face value, said bonds to be held by you as collateral security only for a loan of six thousand ten and 00-100ths dollars ($6,010) . . ."

It seems too plain for serious discussion that this is simply a consent for the assignment of the bonds to be held as security, and in no respect is it a guaranty that the note would be paid by McDonald & Jones. This same question was presented in *Van Doren Roofing &*

Cornice Co. v. Guardian Casualty & Guaranty Co., 99 Wash. 68, 168 Pac. 1124, and we there held that a letter, in substance the same as the one before us, was not a contract of guaranty, saying:

"The request to make the loan, being recited in the same sentence with the waiver and as its inducement, can raise no implication that it was intended also as a guaranty of payment. Such a guaranty, had it been intended, could have been expressed by inserting the three words 'guarantee its payment' after the word 'hereby,' and the recital as to waiver would then have been unnecessary and wholly useless."

We also, in that same case, held that oral evidence was not admissible to prove an intention not expressed in the writing. It is clear, therefore, that this letter was not a guaranty of the payment of the note; and the surety company was therefore not bound to pay the note upon default of the principal.

It is next argued that the court erred in refusing to allow the contractors, McDonald & Jones, the sum of $974.95 for 2,635 yards of fill. When the contract was let, the specifications for the work provided, among other things:

"The contract to be awarded under these specifications will not include the improvement of any portion of the above district occupied by virtue of any railroad, street railway or other grant or franchise requiring improvement or maintenance by the holder of such grant or franchise of the portion so occupied."

It appears that the Seattle, Renton & Southern Railway Company occupied a portion of Twenty-fourth avenue South, by virtue of a franchise, for street railway purposes. The part occupied was an eighteen-foot strip. The franchise of the street railway company obligated that company to fill the portion of the street covered by the franchise. At the time the contract for the improvement of the street was awarded

to McDonald & Jones, the city demanded that the street railway company fill that portion of the street occupied under the franchise in advance of the work of filling the remainder by McDonald & Jones. In making this fill, the street railway company permitted the slopes to extend beyond the boundaries of the eighteen-foot right-of-way and into that portion of the street to be filled by the contractors. The city engineer's office estimated the fill thus placed by the railway company at 2,635 yards. McDonald & Jones contend that they are entitled to pay for this work done by the railway company. The board of public works refused to allow the contractors for the yardage put in by the street railway company, and it is now claimed that the trial court should have allowed to McDonald & Jones $974.95 for this work. The contract provides, at section 5:

"That the city engineer or board of public works shall have the right to diminish, increase or eliminate any of the items given in the approximate list of quantities furnished by the city engineer either before or after the commencement of the work, and such changes shall not constitute a claim for loss of anticipated profits."

The fill was made by the street railway company. The contractors, McDonald & Jones, did not make this part of the fill. Under this provision of the contract, the board of public works clearly had the right to eliminate from the contract to McDonald & Jones the work done by the railway company.

These are the only two points discussed by appellant, and we are satisfied that the trial court correctly found upon both points.

The judgment is therefore affirmed.

MAIN, C. J., HOLCOMB, MACKINTOSH, and CHADWICK, JJ., concur.

[No. 14708. Department Two. August 3, 1918.]

WILLAPA HARBOR SAND & GRAVEL COMPANY, *Appellant*, v. PACIFIC COUNTY, *Respondent*.[1]

HIGHWAYS—STATE CONTRACTS—STATUTES—LIABILITY ON CONTRACT MADE BY COUNTY. Under Rem. Code, § 5879-2 *et seq.*, outlining a general system for the improvement of permanent highways, to be contracted for by the boards of county commissioners on approval of the state highway commissioner, and to be paid for by the state from the state highway fund, after certificate by the county boards, the state is a necessary party defendant in an action to compel payment of a claim duly certified by the county officials to the state highway commissioner; since the contract with the county was made with reference to the act, and the state, not the county, was liable thereon.

Appeal from a judgment of the superior court for Pacific county, Reynolds, J., entered October 17, 1917, dismissing an action on contract, on sustaining a demurrer to the complaint. Affirmed.

Welsh & Welsh, for appellant.

John I. O'Phelan, for respondent.

CHADWICK, J.—In the summer of 1913, Pacific county undertook the improvement of a highway known as permanent highway No. 5. The improvement was undertaken under the permanent highway act of Laws of 1911, ch. 35, p. 118, amended Laws 1913, ch. 154, p. 484 (Rem. Code, § 5879-2 *et seq.*). The main contract was let to one H. B. Eckert. Thereafter, and as part of the same undertaking, the board of county commissioners on behalf of the county entered into a contract with the appellant for the furnishing of 550 cubic yards of sand, more or less, and 1,150 cubic yards of gravel, more or less, of a kind and quantity to be approved by the county engineer of Pacific county. Appellant furnished

[1]Reported in 174 Pac. 450.

cement, sand, and gravel of the reasonable value of $6,527.49. It has been paid $4,252.40, which, with the sum of $431.90 credited for sacks returned, leaves a balance due under its contract of $1,143.19.

It is admitted that Eckert completed his contract, that his work was approved by the board of county commissioners, and that it certified that the whole sum remaining due on the contract, including the amount due appellant, was due him and that he presented his claim to the state highway commissioner so certified, and that, upon this voucher, the state auditor issued warrants for the full amount due for the cost of the road. Eckert now retains possession of all of the warrants issued to him, or the funds if the warrants have been paid. This fact appearing, appellant presented a claim in the usual form to the board of county commissioners. The amount due it is not denied. After consideration, the board made findings as follows:

"In the matter of the claim of the Willapa Sand & Gravel Company for cement, sand, and gravel furnished the Contractor H. B. Eckert, on state road No. 5, the amounts and quantities and prices are found to be correct, and the same is hereby ordered certified to the state highway commissioner and state auditor for payment out of the funds called for by their contract, to wit: the permanent highway fund.

"It is ordered that a copy of the above order be forwarded to the state highway commissioner."

This certificate was presented by appellant to the state highway commissioner. That officer refused to approve it or to issue any voucher therefor and refused to certify the claim to the state auditor. Thereafter appellant demanded of the state auditor that he issue warrants for the amount of his claim and was met with a like refusal. It is conceded that there are funds in the permanent highway fund applicable to the payment of appellant's claim and sufficient in

amount. The contract, which is made a part of the complaint, provides:

"Said sand and gravel to be deposited along the side of permanent highway No. 5 . . . and to be paid for by Pacific county, Washington, to said seller at the rate of one dollar and thirty-five cents ($1.35) per cubic yard within ten days after the monthly payments thereof shall be examined and approved by the board of commissioners of Pacific county, Washington, at their ordinary monthly session, by warrants drawn on the permanent highway funds payable to the seller."

The respondent demurred to the complaint upon the grounds that the complaint does not state facts sufficient to constitute a cause of action, and that there is a defect of parties defendant; that the state of Washington should have been named as a defendant. The court sustained the demurrer, entered a judgment of dismissal, and this appeal follows.

It is the contention of appellant that the case falls within the rule of *Osborne, Tremper & Co. v. King County,* 76 Wash. 277, 136 Pac. 138, and like cases wherein it is held that, where a municipality makes a contract within the range of its power to contract and agrees to pay out of some fund, although it be in an illegal manner or from a fund not properly applicable to the payment for such services or property, the controlling principle is the initial power to make a valid contract; and where it so appears, there is an obligation to pay in some manner or from some fund. In that case the court, referring to the case of *Hitchcock v. Galveston,* 96 U. S. 341, said:

"The plaintiff agreed to construct certain sidewalks for the defendant and take its pay in 'Galveston City Bonds for Sidewalk Improvement, at par.' It developed that the city could not legally issue such bonds, and it thereupon sought to cancel the contract and avoid payment for the work. The court held that, inas-

much as the city had power to make the improvement and to contract for its construction, the fact that the contractor agreed to take bonds which the city had no power to issue in payment did not defeat the contract nor relieve the city from its obligation to pay.

"They (the contractors) are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract, the city has broken it. It matters not that the promise was to pay in a manner not authorized by law."

But manifestly these cases can have no application to the case at bar. At the session of the legislature of 1911, the state, in the exercise of its sovereign function to build and maintain highways, outlined a general system for the improvement of permanent highways in the state of Washington. In the prosecution of its scheme, it seized upon the boards of county commissioners of the several counties as convenient agents to contract directly, the plans being approved by the state highway commissioner, and to oversee the work, but no power of payment was granted to the several boards. The time and manner of payment was reserved by the state and were to be made only upon the certificate of the state highway commissioner to the state auditor. The funds are in no sense county funds. Appellant contracted with reference to this law and agreed to take its pay in accordance therewith. It is true that its contract is made directly with the board of county commissioners, but it agreed that it would

ask no more of the county than a certificate from the board that it had performed its contract. This puts appellant to the burden of seeking relief through the state highway commissioner and the state auditor.

The complaint does not state a cause of action against the county, because the board of county commissioners has done all that it agreed to do. It has fully performed its duty. It is true that it may have been guilty of a misprision in that it gave a certificate to Eckert which misled the state highway commissioner into certifying a claim in which the amount due appellant had been wrongfully included. But this did not make the county liable. It might be that appellant could maintain an action against the individual members of the board because of their negligence, or because of a wrongful diversion of the fund; but with that question we are not now concerned, and it is likely that it should not be considered even to the extent of raising the question, for appellant has charged in its complaint that there are sufficient funds in the permanent highway fund to satisfy its demand.

Those of our cases holding that a party who contracts with a municipality, and agrees to take his compensation out of a fund raised by special assessments or some special or limited fund, cannot assert a general liability or take judgment to be satisfied out of the general fund or the current expense fund of the municipality are in point. *State ex rel. American Freehold-Land Mortgage Co. v. Tanner,* 45 Wash. 348, 88 Pac. 321; *State ex rel. Security Savings Society v. Moss,* 44 Wash. 91, 86 Pac. 1129; *Potter v. Whatcom,* 25 Wash. 207, 65 Pac. 197; *Rhode Island Mortgage & Trust Co. v. Spokane,* 19 Wash. 616, 53 Pac. 1104; *State ex rel. Pierce County v. Superior Court,* 86 Wash. 685, 151 Pac. 108; *State ex rel. Bradway v. DeMattos,* 88 Wash. 35, 152 Pac. 721.

We hold that the complaint does not state a cause of action, and further that it is defective in that the state is a necessary party.

Affirmed.

MAIN, C. J., MOUNT, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14732. Department Two. August 8, 1918.]

CLARK L. SMITH *et al., Respondents,* v. THE CITY OF SPOKANE, *Appellant.*[1]

MUNICIPAL CORPORATIONS—STREETS — PERSONAL INJURIES — DEFECTIVE CROSSINGS—QUESTION FOR JURY. Whether a city was negligent in maintaining a smooth, slippery, manhole cover in the line of crossing for foot travel, is for the jury, where plaintiff, in the exercise of due care, slipped and fell upon it, and other pedestrians had fallen upon it.

SAME—STREETS—DEFECTIVE CROSSINGS — ACTIONS — INSTRUCTIONS. Where there was no question as to the location of a manhole, alleged to be in the crossing, the court is justified in treating it as an admitted fact and in instructing upon the theory that it was in the sidewalking or crossing between corners.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered September 17, 1917, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained in a fall upon a defective street. Affirmed.

J. M. Geraghty and *Alex M. Winston,* for appellant.

Tolman & King, for respondents.

CHADWICK, J.—Respondents allege as a cause of action:

"That on, and long prior to, the 2d day of January, 1917, the defendant negligently permitted and maintained a manhole covering in Post street, at the south-

[1]Reported in 174 Pac. 2.

east corner of Main avenue, in said city, within the lines (extended) of the sidewalk on the south side of said Main avenue; which covering was of rounded surface, which surface had by long use and travel thereupon and thereover become smooth and slippery; which slipperiness was increased by water, ice, or snow thereon.

"That, by reason of said rounded surface and by reason of said smoothness and said slipperiness thereof, said cover was a constant danger to foot passengers traveling on said street and stepping thereon; which was, on and long prior to said 2d day of January, 1917, well known to defendant, or would have been known to it by the exercise of reasonable care by it in that behalf.

"That on said 2d day of January, 1917, while plaintiff, Belle S. Smith, was in the exercise of due care and caution, she stepped upon said cover, which was then and there wet and partially covered with snow and ice, and slipped and fell thereon and fractured the internal and external malleoli of her right leg and displaced her right foot inward and backward and also sustained abrasions of both of her elbows; that the injury to the right leg and foot of the said Belle S. Smith is permanent in character."

The manhole cover has been brought here as an exhibit. The burden of appellant's argument is that a view by the court of the manhole cover will warrant a holding, as a matter of law, that the cover is not such a menace as to make the city liable to answer in damages to one who is injured by falling thereon; that the city is not an insurer but is only required to keep its streets in a reasonably safe condition for persons exercising ordinary care and prudence.

Our attention is called to the fact that, in the city of Spokane, it is necessary to maintain water and sewerage systems and that manholes are an essential part of these systems and that, to hold the city to a burden of keeping the manhole covers to an exact degree of

smoothness or roughness, would put upon the cities of the state the burdens of an insurer.

While this argument might seem attractive if the manhole had been located at some place in the street other than upon the line of crossing for foot travel, it runs counter to our own holdings in the several cases where verdicts have been sanctioned for injuries sustained on sidewalks. *Smith v. Tacoma,* 51 Wash. 101, 98 Pac. 91, 21 L. R. A. (N. S.) 1018; *Piper v. Spokane,* 22 Wash. 147, 60 Pac. 138; *Smith v. Seattle,* 33 Wash. 481, 74 Pac. 674; *Seattle v. Puget Sound Imp. Co.,* 47 Wash. 22, 91 Pac. 255, 125 Am. St. 884, 12 L. R. A. (N. S.) 949; *DeLor v. Symons,* 93 Wash. 231, 160 Pac. 424; *Peterson v. Seattle,* 100 Wash. 618, 171 Pac. 657.

The testimony shows that respondent Clara Belle Smith was in the exercise of due care, that the manhole had become smooth and that other pedestrians had fallen on it. It was for the jury to say whether the crossing was reasonably safe for persons exercising ordinary care and prudence.

Counsel contends that the case went to the jury upon the issue that there was an appreciable slope to the cover, and that it was so smooth and slippery as to be dangerous, and from the ocular evidence argues, *In claris non est locus conjecturis,* that it is obvious that the cover is not so smooth as to be dangerous and that it has no appreciable slope, and that the only ground for negligence upon which the verdict might be sustained is that the manhole was maintained in the way of foot travel.

We have quoted the complaint. We are of the opinion that it sufficiently charges that the manhole was in the crossing, and have examined the instructions of the court with a view of ascertaining whether the court advised the jury of its duty in respect of this charge. While the court did not instruct upon this issue spe-

cifically, it did instruct generally that respondents must recover upon "the matters and things complained of in her complaint." There was no question raised as to the location of the manhole, and the court was warranted in treating it as an admitted fact and in instructing the jury upon the theory that the manhole was on the sidewalk or on the crossing between corners.

Affirmed.

MAIN, C. J., MOUNT, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14827. Department Two. August 8, 1918.]

H. J. HIBSCHMAN, *as Trustee etc., Appellant,* v. CLIFFORD D. BEVIS *et al., Respondents.*[1]

BANKRUPTCY—ACTION BY TRUSTEE—PLEADING—INSUFFICIENCY OF ASSETS. Since a trustee in bankruptcy has no greater rights than the creditors, in an action to obtain possession of property of the bankrupt fraudulently conveyed or subject to creditor's liens, he must allege and prove that he has not sufficient assets in his hands to satisfy claims of creditors of the bankrupt.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered August 4, 1917, upon findings in favor of the defendants, in an action by a trustee to recover property belonging to the estate of a bankrupt. Affirmed.

E. H. Belden, for appellant.

Crandell, Williams & Crandell and *Fred M. Williams,* for respondents Cora Bevis *et al.*

Luby & Pearson and *John E. Orr,* for respondents Clifford D. Bevis *et al.*

[1]Reported in 174 Pac. 5.

CHADWICK, J.—Plaintiff, as trustee in bankruptcy for M. L. and L. G. Bevis, brought this action to obtain possession of certain property alleged to be the property of the bankrupts, but claimed by the various defendants, either as owners or as creditors having a lien. While the court held generally in favor of the defendants, the first and controlling question is whether the complaint states a cause of action.

Plaintiff has neither alleged nor proved that the property is required to pay claims against the bankrupts' estate. That a trustee takes title to the property of a bankrupt, and that he may avoid any transfer that might have been avoided by a creditor, is not questioned. A trustee in bankruptcy has no greater right, nor is he accorded higher standing in the civil courts, than a creditor would have if the suit were brought by him in his own behalf. He is subject to the same rules of pleading and is bound to meet the same measure of proof as if no bankruptcy proceeding were pending. In consequence, the rule is quite universal that a trustee in bankruptcy cannot maintain an action unless it is alleged and sustained by proof that he has not sufficient assets in his hands to satisfy the claims of the creditors of the debtor. 7 C. J. 249 and 266; 3 R. C. L. 300; *Crary v. Kurtz,* 132 Iowa 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St. 549; *Drew v. Myers,* 81 Neb. 750, 116 N. W. 781, 17 L. R. A. (N. S.) 750; *Mueller v. Bruss,* 112 Wis. 406, 88 N. W. 229; *Mayhew v. Todisman,* 246 Mo. 288, 151 S. W. 436; *Seager v. Armstrong,* 95 Minn. 414, 104 N. W. 479, 480.

The theory of the law is that a suit by a trustee in bankruptcy is essentially a creditor's bill, and that the insufficiency of the property left in the debtor's hands is an essential to the right to question a fraudulent conveyance, whether the suit be maintained by a creditor or by a trustee in his own behalf. If this be so, the

case of *Crandall v. Lee*, 89 Wash. 115, 154 Pac. 190, is in point.

The judgment is affirmed.

MAIN, C. J., MOUNT, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14892. Department Two. August 3, 1918.]

THE STATE OF WASHINGTON, *on the Relation of W. W. Sherman, State Treasurer, Plaintiff*, v. F. E. PAPE, *State Forester and Fire Warden, Respondent.*[1]

STATES—FUNDS — COLLECTIONS FOR FIRE PROTECTION — CONSTITUTIONAL AND STATUTORY PROVISIONS. Sums paid or contracted to be paid by the state forester for fire protection, and, by Laws 1917, p. 349, to be made a lien upon the property protected and extended on the tax rolls and upon collection by county officials to be "repaid" to the state forester to be applied to the expenses incurred unless he is "reimbursed by the owner," are not "state" funds or taxes levied or collected for state purposes to be paid into the state treasury and paid out only on appropriations by the legislature, within the provisions of Const., art. 7, § 6, art. 8, § 4, or art. 11, § 15; since the act was within the police power, without the necessity of making the funds state funds, and they were not taxes levied for state purposes, but assessments laid on private lands particularly for the benefit done thereto.

Application filed in the supreme court June 19, 1918, for a writ of mandate, to compel payment of funds into the state treasury. Denied.

The Attorney General and *Glenn J. Fairbrook, Assistant*, for relator.

Palmer & Askren and *E. C. Million*, for respondent.

HOLCOMB, J.—This is an original application for mandate to compel the respondent to pay into the state treasury funds aggregating $6,987.63, assessed and

[1]Reported in 174 Pac. 468.

charged by the respondent against private forest landowners for fire protection during the year 1917.

It is alleged that, pursuant to ch. 105, Laws of 1917, p. 349, § 2, during the year 1917, respondent contracted with divers persons for the patrolling and protection from fire of certain forest property subject to protection in the manner provided in the act, and thereafter received from the owners of such property, and from the treasurers of the counties to which such sums had been reported by the respondent and upon the tax rolls of which such amounts had been extended by the county assessors pursuant to law, the sum so stated; that respondent had refused and still refuses to pay the moneys into the treasury of the state of Washington and threatens to, and will, unless compelled by the court to pay the moneys into the treasury of the state, apply the same in payment of the sums due upon contract for patrolling and fire protection.

Section 2 of the act above mentioned reads:

"Any amounts paid or contracted to be paid by the state forester for this purpose [fire protection] shall be a lien upon the property patrolled and protected and, unless reimbursed by the owner . . . shall be reported by the state forester to the county assessors of the county or counties in which the property is situated who shall extend the amounts upon the tax rolls. The procedure provided by law for the collection of taxes and delinquent taxes shall be applicable thereto, and upon collection thereof the county officials shall repay said amounts to the state forester to be applied to the expenses incurred in carrying out the provisions of this section."

The theory of the relator, supported by the *Attorney General,* is that chapter 105, Laws 1917, p. 349, relating to the funds in question and the duties of the state forester and fire warden, provides no method of accounting under which the state forester shall administer the

funds; that he is not directed to make any disbursements, and that he is not required to give any bond to assure his faithful administration of the fund; that, in fact, no law of the state relating to the state forester required him to give any sort of bond. It is, therefore, contended that these provisions do not create a trust fund which may be retained by the state forester without being deposited in the state treasury and paid out at his own instance without an appropriation, but that the moneys so remitted to him must be deposited in the state treasury and not disbursed except in pursuance of an appropriation by the legislature. They cite the following provisions of the state constitution as controlling:

"All taxes levied and collected for state purposes shall be paid in money only into the state treasury." Const., art. 7, § 6.

"No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years from the first day of May next after the passage of such appropriation act, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum." Const., art. 8, § 4.

"All moneys, assessments, and taxes belonging to or collected for the use of any county, city, town or other public or municipal corporation, coming into the hands of any officer thereof, shall immediately be deposited with the treasurer, or other legal depositary, to the credit of such city, town, or other corporation respectively, for the benefit of the funds to which they belong." Const., art. 11, § 15.

Relator, therefore, argues that it is the manifest intention of the constitutional provisions that all moneys

collected by the state for any purpose are required to be paid into the state treasury, and disbursed only in pursuance of an appropriation by the legislature, although moneys collected under some particular statute may not be what could technically be called funds belonging to the state. The relator lays stress upon the fact that § 2 of the act uses the word "reimburse" in referring to the amount incurred for protection of particular owners of property, and uses the word "repay" in speaking of the amounts collected by the assessors. He therefore urges that these provisions indicate that the intent of the act was that the legislature should make an appropriation of the amounts to be so collected to the expenses incurred by making a blanket appropriation in the appropriation bill rather than expressing any intent that the amounts should constitute a trust fund. The theory of the relator is based upon the premise that the funds provided for in this act are state or public funds, and therefore controlled by the constitutional provisions relating to the deposits and appropriation thereof. If the premise is incorrect, the deductions necessarily fall.

In *State ex rel. Johnson v. Clausen*, 51 Wash. 548, 99 Pac. 743, we had under consideration the question of whether moneys received by the treasurer of the board of regents of the State College of Washington, from students' fees and rents and sources other than the general and state governments, were to be considered as part of the "state finances" and to be paid over by the treasurer of the board of regents to the state treasurer, within the meaning of an act of 1907, Laws 1907, p. 179, entitled: "An act relative to the finances of the state," etc., providing that each state officer or other person authorized to collect moneys belonging to the state, or any institution thereof, shall each day transmit all moneys to the state treasurer.

It was there held that moneys so received were not "state finances" under the act in question, although the State College of Washington was a state institution. The constitutional provisions relied on in this case were not discussed in that case and apparently not raised. If, however, the premise on which relator relies in this case, namely, that the funds in question are public funds or state funds or state finances, however they may be defined, is the same as in that case, the result must be the same.

It is of no concern to us that the legislature provided for a system of fire control which provides for raising funds and the administration thereof by a state officer without any system of accounting, or such system of checks and balances as seems to be the policy of the law in regard to all officers handling public funds. They are, under the provisions of the act, to be obtained from forest landowners to protect against fires, and forest landowners under the act are given the privilege of protecting their own lands and of forming cooperative protective agencies to protect their lands from fire; and if they fail so to protect their lands adequately, the state forester is required to provide such protection at a cost of not to exceed five cents per acre per annum. Any amounts paid or contracted to be paid by the state forester for this purpose shall be a lien upon the property patrolled and protected and, unless reimbursed by the owner within ten days after October first of the year in which they were incurred, on which date the state forester shall be prepared to make statement thereof upon request to any forest owner whose own protection has not been previously approved by him as adequate, shall be reported by the state forester to the county assessors of the county or counties in which the property is situated, who shall extend the amounts upon the tax rolls covering such property, and the

amounts shall be collected at the time and in the same manner that the next taxes on the same property are collected. These disbursements so made by the state forester are made for and on behalf of the private forest landowners, for their special benefit as well as incidentally for the general benefit of the whole public. The disbursements are required to be laid, if not paid, upon the lands benefited, and collected by the taxing officers. But this arrangement does not necessarily make the assessment taxation, or the funds when collected public funds.

Protection against fire in the forests of Western Washington is imperative, and it is within the police power of the state to provide for the imposition of the cost of such protection against the private forest lands so affected. We held in *Wedemeyer v. Crouch,* 68 Wash. 14, 122 Pac. 366, 43 L. R. A. (N. S.) 1090, and in *Northern Pac. R. Co. v. Adams County,* 78 Wash. 53, 138 Pac. 307, 51 L. R. A. (N. S.) 274, that laws providing for the destruction of noxious weeds upon private lands and public highways were constitutional as within the police power of the state, and that the assessment of the costs of the destruction thereof against private lands was valid.

In the exercise of its police power the state undoubtedly could have made all funds its own, to be dealt with as state funds contemplated by the constitution; but it was not necessary so to do. The legislative wisdom could in its discretion provide for the collection and administration of the funds without making them state or public funds. This the legislature by this act undoubtedly did, and it is not our business to question its wisdom. These funds were not taxes levied and collected for state purposes generally, but were assessments laid upon private lands particularly for the

benefits done those private lands. It was not necessary, therefore, that the sums imposed and collected should come into the state treasury as provided by art. 7, § 6.

Section 4, art. 8, of the constitution, is almost identical with similar provisions in other state constitutions which have been examined, and as to one such the supreme court of Pennsylvania, in *Commonwealth v. Powell,* 249 Pa. 144, 94 Atl. 746, said that that provision of its constitution "simply means that the public funds are not to be expended in any way, except as directed by the law-making power." The supreme court of Minnesota, in *State ex rel. Nelson v. Iverson,* 125 Minn. 67, 145 N. W. 607, held that a provision of the constitution of that state prohibiting the payment of money out of the state treasury except in pursuance of an appropriation by law has no application to the issuance by the state auditor of a warrant on the state treasurer for the distribution of the gross earnings taxes imposed upon and collected from suburban railroad companies as authorized by an act of the legislature, because the funds so raised did not vest in the state the title to the money so raised and did not properly belong to the general revenue fund of the state. See, also, *State ex rel. Linde v. Taylor,* 33 N. D. 76, 156 N. W. 561, Ann. Cas. 1918A 583, L. R. A. 1918B 156; *Ex parte Lucas,* 160 Mo. 218, 61 S. W. 218; *State ex rel. Spencer Lens Co. v. Searle,* 77 Neb. 155, 108 N. W. 1119, 109 N. W. 770; *State ex rel. Armington v. Wright,* 17 Mont. 565, 44 Pac. 89.

We are firmly convinced that, under the act in question, the state forester is but an agent designated by the law to carry out the legislative will. It was the manifest intent of the legislature to provide for adequate protection of the forest lands from fire against

the negligence or wilfulness of any forest landowner, and to compel the reimbursement of such cost, to the limit specified, by the person so protected. In doing so, the method was devised of collecting the moneys expended in such protection by customary and certain means. It was intended, of course, that the state should lose nothing and at the same time that funds should be readily at hand for the purpose desired. Or, if it should be required to define the sums disbursed by the state forester as moneys appropriated, as was said in *State ex rel. Johnson v. Clausen, supra:*

"A reading of this act in connection with the then existing laws heretofore quoted makes it apparent that the legislature did not intend by this general language to reach out and include the fund in controversy."

And in *State ex rel. Peel v. Clausen,* 94 Wash. 166, 162 Pac. 1, as to the constitutional provision regarding the manner of making an appropriation by the legislature, it was held:

" 'It is sufficient if the legislative intent to make an appropriation clearly appears, expressly or by implication, from the terms of the statute.' 36 Cyc. 892. . . . 'No arbitrary form of expression is dictated by the constitution, and none should be required.' . . . 'There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation.' "

So it could with ample support be held that the legislative act under consideration appropriated in advance the moneys which were to be reimbursed from the forest landowners.

We, therefore, find nothing in the act in question violative of any of the constitutional provisions invoked, and conclude that the relator is not entitled to have the funds paid over into the state treasury to be paid out only by legislative appropriation further than has

been heretofore made. The policy of the administration thereof is for the legislature to determine.

Writ denied.

MAIN, C. J., CHADWICK, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 14032. Department One. August 7, 1918.]

EMMA F. WHITE, *as Executrix etc., Appellant,* v. KING COUNTY, *Respondent.*[1]

LIMITATION OF ACTIONS — NEGLIGENT CHANGE OF GRADE — ACTIONS NOT OTHERWISE PROVIDED FOR. An action for negligent injury to property from the changing of the grade of a highway is not an action for trespass, limited to three years, but falls within Rem. Code, § 165, declaring a two-year limitation on all actions not otherwise specifically provided for.

SAME—TOLLING STATUTE—FILING CLAIM. The filing of a claim against a county within the statutory period does not toll the statute of limitations, which begins to run from the act giving rise to the action, and not from the filing of the claim.

Appeal from a judgment of the superior court for King county, Smith, J., entered May 11, 1916, in favor of the plaintiff, upon sustaining a demurrer to the complaint, in an action for damages from change of grade. Affirmed.

L. R. Kerley, for appellant.

Alfred H. Lundin and *S. M. Brackett,* for respondent.

PER CURIAM.—The appellant, individually and as executrix of the estate of her deceased husband, began this action on March 16, 1915, to recover consequential damages caused to certain lands as the result of increased seepage and drainage thereon by reason of raising the grade of an established county road.

[1]Reported in 174 Pac. 3.

The complaint alleges that the appellant and her husband, in the year 1901, donated a sixty-foot right of way to the county for road purposes, and that the initial improvement of the road was made during the same year by grading a roadway in the center thereof sixteen feet in width and surfacing the same with gravel; that, at a point where the crest of the roadway as thus improved was about one foot above the natural surface of the ground, the appellant and her husband had theretofore improved their property prior to the year 1901 by the erection of a hotel building, and had later made improvements in and about the hotel with reference to such established grade; that, during the year 1912, the county altered the road in the construction of a paved highway, under the permanent highway system of the state, by widening the roadway from sixteen to twenty-five feet and by negligently raising its grade two feet two inches above the former level; that the change of grade and surfacing were completed and accepted by the board of county commissioners on December 2, 1912; that the change of grade was without the consent of the appellant and her husband; that the road was left in a condition sloping towards their hotel property in such a manner that, during the rainy season, the water and slush from the road would constantly run into the hotel property, rendering it almost untenantable and making it less attractive to patrons, thereby reducing its trade and custom; that no provision was made for drains through the embankment caused by the elevation of the road, and that, by reason thereof, water from above the road and water draining off the road is thrown and held in the narrow area between the highway and the building and can only be dissipated by seepage or evaporation, none of which conditions existed under the old established

road grade; that, by reason of the increased height of the grade, the appellant's hotel building is now "in a hole" in comparison with its former situation, and that the hotel cannot be rendered suitable for its original purpose, or safe or convenient for any purpose, unless it is raised to a level with the new grade, which cannot be done at a less cost than from $3,000 to $4,000. Judgment is prayed in the sum of $5,000. The complaint also alleges the filing of a claim for damages with the county commissioners on January 13, 1914.

The respondent demurred to the complaint on the ground that it did not state a cause of action, and that it showed upon its face that any alleged cause of action is barred by the statute of limitations. This demurrer was sustained by the court, and the appellant, electing to stand upon her complaint, judgment was entered dismissing the action, from which this appeal is prosecuted.

Whether or not the complaint states a cause of action is unnecessary to be determined, in view of our conclusion that the action was not timely instituted. The complaint is based on injuries arising from an alleged tortious act in making a change of grade in the highway, which was fully consummated by its acceptance by the respondent on December 2, 1912. The complaint herein was filed with the county clerk on March 16, 1915, more than two years after the cause of action arose. We have heretofore held that actions of this character involving negligent injury do not fall within the three-year limitation provided for trespass on real property, but are governed by Rem. Code, § 165, declaring a two-year limitation on all actions not otherwise specifically provided for. *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 76 Pac. 298, 102 Am. St. 881; *Denney v. Everett*, 46 Wash. 342, 89 Pac. 934, 123 Am. St. 934.

The fact that the appellant filed her claim for damages with the county board within two years prior to bringing her action would not operate to toll the statute of limitations. If a presentation is necessary in such a case, which may be doubted, in view of our decisions in the cases of *Kincaid v. Seattle,* 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; *Provident Trust Co. v. Spokane,* 75 Wash. 217, 134 Pac. 927; and *Hollenbeck v. Seattle,* 88 Wash. 322, 153 Pac. 18, it is but a part of the procedure necessary to perfect the cause of action; not the act giving rise to the cause of action, from which alone the limitation of the statute must be measured.

The complaint, showing on its face that the action was not brought within the required time, the demurrer was properly sustained. The judgment is affirmed.

[No. 14589. Department Two. August 7, 1918.]

FRANK FLUCKIGER, *Appellant,* v. THE CITY OF SEATTLE, *Respondent.*[1]

MUNICIPAL CORPORATIONS—ORDINANCES—LIABILITY TO VIOLATORS—NONENFORCEMENT—EFFECT. The nonenforcement by the police of an ordinance against coasting on a street does not make the city liable for personal injuries sustained by one who was violating the ordinance; since administrative officers have no power to modify the legislative acts of the city council.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered July 2, 1917, dismissing an action in tort, upon granting a nonsuit, after a trial on the merits. Affirmed.

Jay C. Allen, for appellant.

Hugh M. Caldwell and *Frank S. Griffith,* for respondent.

[1]Reported in 174 Pac. 456.

CHADWICK, J.—The appellant was injured in a coasting accident in the city of Seattle. Prior to the time of the accident, the city council of the city of Seattle had passed an ordinance which prohibited coasting on any sidewalk or paved street. The ordinance had not been enforced by the police department. Coasting had been indulged in by those so inclined in several parts of the city, and in one or two instances the police department had detailed men to protect traffic while the sport was going on.

The controlling question is whether a city is liable to answer in damages to one who is injured while doing a thing which is prohibited by a city ordinance, although tolerated by the police officers of the city. It is the theory of appellant that the ordinance should not be raised as a bar to a recovery; that it has been abrogated by long disuse and nonobservance, if not by the connivance of the officers whose duty it is to enforce it. He relies upon many cases, including, *Bernard v. Benson,* 58 Wash. 191, 108 Pac. 439, 137 Am. St. 1051; *Regan v. School District No. 25,* 44 Wash. 523, 87 Pac. 828; *State ex rel. Smith v. Ross,* 42 Wash. 439, 85 Pac. 29; *State ex rel. Cowles v. Schively,* 63 Wash. 103, 114 Pac. 901; *Spokane & Eastern Trust Co. v. Young,* 19 Wash. 122, 52 Pac. 1010; *Keane v. Brygger,* 3 Wash. 338, 28 Pac. 653; *McSorley v. Hill,* 2 Wash. 638, 27 Pac. 552; *Brown v. United States,* 113 U. S. 568; *Chattanooga Plow Co. v. Hays,* 125 Tenn. 148, 140 S. W. 1068.

These cases hold that a practical construction of a statute by long continued action or nonaction is equivalent to positive law, and that the contemporaneous and continued practice of officers whose duty it is to execute or to take special cognizance of the statute is the highest evidence of its meaning and should not be disregarded except for cogent reasons.

It was the opinion of the court below—and to that opinion we are inclined—that these cases are not controlling. They affirm a rule of construction resorted to by the courts when called upon to ascertain the meaning of doubtful or ambiguous statutes. The rule there announced has never been allowed to overcome a positive statute fixing in plain and certain terms a right or liability when a subject of litigation, and this is so whether the cause of action sounds in contract or in tort. The mere nonenforcement of an ordinance by the administrative officers of a city will not overcome it or estop the municipality from claiming its benefit when sued by one whose injury is traceable to its nonobservance.

Judge Dillon in his work on Municipal Corporations (5th ed.), § 1627, lays down the rule as follows:

"Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation is not bound to secure a perfect execution of its by-laws, relating to its public powers, and it is not responsible civilly for neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened."

See, also, *Wheeler v. Plymouth,* 116 Ind. 158, 18 N. E. 532, 9 Am. St. 837; *Hines v. Charlotte,* 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844; *Faulkner v. Aurora,* 85 Ind. 130, 44 Am. Rep. 1; *Schultz v. Milwaukee,* 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779; *Norristown v. Fitzpatrick,* 94 Pa. St. 121, 39 Am. Rep. 771.

That the failure to execute an ordinance on the part of administrative officers will not make the city liable or permit one who has violated the ordinance to take advantage of what may well be called his own wrong, rests in even a deeper principle. The act of a city council in passing an ordinance is an expression of the

corporate power of the city. That duty, so far as the concern of the public goes, is fully performed when the ordinance is passed, and to permit administrative officers whose duty rests in the police power rather than in the legislative power of the city, to nullify an ordinance by ignoring it or failing wilfully to enforce it, would be to deny to the city council the power to legislate. Such a holding would put the power to veto an ordinance which, from the very nature of things, must be accepted as the true expression of the will of the public, in the hands of an agency having no legislative power or responsibility.

This court has heretofore had occasion to meet this question in a case, which, if not on all fours, is like in principle. In *Kitsap County Transportation Co. v. Seattle*, 75 Wash. 673, 135 Pac. 476, Ann. Cas. 1915C 115, the court said:

"But the ordinance imposes a penalty on all who may thus transgress its provisions, and places the duty upon the port warden of enforcing it. If, then, the city is liable in damages, it must be by reason of the negligence of the port warden in failing to enforce the ordinance. The general rule is that a city is not civilly liable for neglect of duty on the part of its officers in respect to the enforcement of ordinances."

And then, after quoting the text of Dillon, the opinion continues:

"In the present case, the negligence, if any, being that of the port warden in failing to exercise proper diligence in the enforcement of the ordinance, would not render the city liable to respond in damages."

Affirmed.

MAIN, C. J., HOLCOMB, MOUNT, and MACKINTOSH, JJ., concur.

[No. 14641. Department Two. August 7, 1918.]

WILLIAM BROWITT *et al., Respondents,* v. LOTTIE FIEGLE *et al., Appellants,* FRANK FIEGLE, *Defendant.*[1]

FRAUDULENT CONVEYANCES—TRANSACTIONS BETWEEN HUSBAND AND WIFE—SUBSEQUENT CREDITORS. Deeds made by husband to wife at a time when he was free from debt and not contemplating engaging in a hazardous occupation, for the purpose of settling advances made to him by the wife and on full consideration, are not fraudulent as to subsequent creditors.

SAME—TRANSACTIONS BETWEEN HUSBAND AND WIFE—GOOD FAITH—BURDEN OF PROOF. Where the good faith of a transaction between husband and wife is assailed, the burden of proof is upon the party asserting the good faith, under Rem. Code, § 5292.

SAME—FAILURE TO RECORD DEED—EFFECT. If a wife's failure to record her deed from her husband is not due to bad faith or to a fraudulent intent, she is not estopped from asserting title against her husband's creditors.

SAME—TITLE OF GRANTEE—IMPEACHMENT BY DECLARATIONS OF GRANTOR. A grantee's title cannot be impeached by declarations of the grantor made subsequent to the transfer, showing the grantor's fraudulent intent as to his creditors.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered July 17, 1917, in favor of the plaintiffs, in an action by creditors to set aside fraudulent conveyances. Reversed.

R. A. Wilcox (Hovey & Hale, of counsel), for appellants.

Harry L. Brown and *E. E. Wager,* for respondents.

CHADWICK, J.—This joint action is brought by two judgment creditors to set aside a deed from Frank Fiegle to his wife, Lottie Fiegle, and also a deed from her to her son, Erich Fiegle. From a decree in favor of the plaintiffs, Lottie and Erich Fiegle have appealed.

[1]Reported in 174 Pac. 444.

The judgments were entered on the 27th day of January, 1917. Executions were issued on both judgments on the 2d day of February following, and returned "wholly unsatisfied." The property sought to be subjected to the judgments is certain lots in the town of Kittitas. On the 12th day of January, 1911, Frank Fiegle executed and delivered two deeds to his wife, one conveying to her a tract of farm land, the other conveying to her the property in controversy. The former was promptly filed for record, but the latter was not filed until the 17th day of February, 1916. On the 19th day of January, 1917, Lottie Fiegle conveyed the property to her son Erich. The respondents are not claiming as creditors of Frank Fiegle at the time he executed the deeds to his wife.

The record presents two principal questions: (1) Did Frank Fiegle convey the Kittitas lots to his wife with the intention of defrauding subsequent creditors? (2) If not, can the judgment creditors set aside her deed because she withheld it from the records?

The first question must receive a negative answer. At the time that he made the deeds, he was not contemplating engaging in a hazardous occupation. He was practically free from debt. He owned real estate in Roslyn of the value of two thousand dollars or more. This was community property, but stood in his name. The parties were married in 1894. The wife then had something in excess of three thousand dollars, which she loaned to her husband at different times. Substantially the entire purchase price of both pieces of property was furnished by the wife. The deeds were made for the purpose of settling the advances which the wife had made from her separate funds.

It cannot be questioned that a husband who is free from debt may make a voluntary conveyance of his property, either to his wife or to a third party. In the

case at bar, the conveyance was not voluntary but for a full consideration.

There is no presumption between strangers that a party has transferred his property with a view to defraud subsequent creditors. The burden of proving fraud is upon the creditor. *Henry v. Yost,* 88 Wash. 93, 152 Pac. 714; *Crandall v. Lee,* 89 Wash. 115, 154 Pac. 190. In a transaction between husband and wife the good faith of which is assailed, the burden of proof is upon the party asserting the good faith. Rem. Code, § 5292.

The second question is one of mixed law and fact. If the wife's failure to record the deed was not due to bad faith or to a fraudulent intent, she is not estopped from asserting title. *Kemp v. Folsom,* 14 Wash. 16, 43 Pac. 1100. In *Petrovitsky v. Smith,* 86 Wash. 151, 149 Pac. 641, it was said that the filing of a deed for record about two years after its execution was only a circumstance from which a fraudulent intent might be inferred.

The case of *Kalinowski v. McNeny,* 68 Wash. 681, 123 Pac. 1074, is relied upon by the respondents for an affirmance of the judgment. The record there showed a juggling of the property involved which warranted the court in inferring a fraudulent intent. The court said:

"When the wife's creditors are pressing, the husband owns the land; when the husband's creditors are pressing, the wife owns the land."

We think the evidence shows that the failure to record the deed to the town lots was due to inadvertence. The other deed was promptly recorded. The evidence does not warrant the conclusion that the deed was purposely withheld from the records or that there was any fraudulent intent.

We have not overlooked the testimony of Browitt, Beal, and Kitchin. Browitt and Beal each said that Frank Fiegle told him, long subsequent to the execution of the deed, that he owned the lots. Kitchin said that Fiegle told him that he would like to beat Beal and Browitt. These statements are denied by Fiegle. It is elementary that a grantor cannot impeach the title of the grantee by declarations made subsequent to the transfer of title.

What we have said makes it unnecessary to consider whether the deed from the mother to the son was for an adequate consideration. We think Lottie Fiegle has sustained the burden which the statute puts upon her.

Reversed.

MAIN, C. J., HOLCOMB, MOUNT, and MACKINTOSH, JJ., concur.

[No. 14710. Department Two. August 7, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. SAM BLACKWELL, *Appellant*.[1]

INTOXICATING LIQUORS—OFFENSES—UNLAWFUL POSSESSION — PRESUMPTION—BURDEN OF PROOF—INSTRUCTIONS. In a prosecution for unlawful possession of intoxicating liquors in excess of two quarts other than beer, the jury is properly instructed by quoting the language of the statute as to the offense, and as to the *prima facie* presumptions of guilt from the fact of possession, and that the burden of rebutting the presumption was upon the accused.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered March 2, 1917, upon a trial and conviction of unlawful possession of intoxicating liquors. Affirmed.

W. C. Donovan and *Geo. H. Armitage*, for appellant.

John B. White and *Harry G. Kinzel*, for respondent.

[1]Reported in 174 Pac. 646.

Holcomb, J.—Appellant was charged and convicted of a violation of the prohibition law then in force (Laws 1915, p. 2; Rem. Code, § 6262-1 *et seq.*). The charge was of having unlawfully in his possession, on a day stated, intoxicating liquor in excess of one-half gallon, other than beer, without a permit issued to him by the county auditor.

Seven errors were assigned as grounds for a reversal, the first of which was waived at the time of argument and submission. Four assignments related to instructions given the jury. These instructions related to, (1) the charge stated, the plea of not guilty, the required element of proof, and the definition of the offense; (2) the law in force, which was quoted, that possession of more than two quarts of intoxicating liquor other than beer, with exceptions in favor of certain persons and for certain purposes, was prohibited; (3) the statutory rule that possession of such quantities, without such exceptions, was *prima facie* unlawful; and (4) that such presumption was rebuttable by proof that the accused obtained the liquor (even though in excess of two quarts of intoxicating liquor other than beer) upon permits to him issued by the county auditor, and with the intent to consume the liquor himself or otherwise dispose of it lawfully.

No fault to the prejudice of the appellant is to be found with any of the instructions. In the first, the court correctly set forth the accusation, stated the plea, specified the degree of proof required, and correctly defined the offense under the statute. The second literally quotes the statute forbidding possession of a quantity of intoxicating liquor other than beer, with certain exceptions stated. The third quotes the statutory presumption from the proven possession of such excess and not within such exceptions. The fourth gives the accused the right, with a scope extremely favorable to

him, to rebut the presumption, if any, raised by the evidence. That the burden of rebutting the presumption, if it had arisen, was upon the accused was correct. *State v. Gray*, 98 Wash. 279, 167 Pac. 951.

The sixth and seventh assignments attack the sufficiency of the evidence, the correctness of the verdict of conviction, and the refusal of a new trial. The evidence was conflicting, but there was ample testimony and justifiable inferences from the evidence as a whole to sustain the verdict.

The trial court considered the evidence, exercised his discretion, and denied a new trial. We find no error in the judgment. Affirmed.

MAIN, C. J., MOUNT, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14759. Department Two. August 7, 1918.]

THE STATE OF WASHINGTON, *on the Relation of John I. O'Phelan, Prosecuting Attorney etc., Appellant,* v. ANTON LUNDQUIST *et al., Respondents.*[1]

DRAINS—ESTABLISHMENT—PROCEEDINGS — OBJECTIONS — WAIVER. Where no objections were made to the order of county commissioners establishing a drainage district and no appeal was taken from an order finding that the plan of drainage was impracticable and assessing the costs of the proceeding against the district, as directed by Rem. Code, § 4150, providing for dissolution of the district, all objections to the legality of the district are waived, and petitioners and owners cannot question the same in *quo warranto* for the purpose of evading the payment of the costs.

Appeal from a judgment of the superior court for Pacific county, Abel, J., entered June 11, 1917, upon findings in favor of the defendants, dismissing *quo*

[1]Reported in 174 Pac. 440.

warranto proceedings against a drainage district, tried to the court. Affirmed.

John I. O'Phelan and *Fred M. Bond,* for appellant.
Welsh & Welsh, for respondents.

MOUNT, J.—This action was brought in the nature of a writ of *quo warranto,* against the drainage commissioners of district No. 2, of Pacific county, and the county treasurer of that county, ostensibly to determine the validity of the organization of the drainage district. While the action is in form a *quo warranto* proceeding, the real purpose of the action is to avoid the cost of organizing the district, which has been ordered dissolved. The appellant's information alleges, in substance, that the county commissioners had no jurisdiction to organize the drainage district because the petition therefor was insufficient; because the notice of the hearing before the commissioners was not published for the time required by law; because the petition for the proposed district did not provide for sufficient drains and laterals and specifications; because changes were made without the knowledge of certain signers of the petition; and because of other alleged imperfections in the procedure. Upon issues joined, the case was tried to the court without a jury. Upon the trial, the court found that the petition for the organization of the district was sufficient, and was signed by the requisite number of freeholders within the proposed district; that sufficient notice was given and upon a hearing the county commissioners found the necessary facts and entered an order for an election to be held in the district to determine whether the district should be organized, and for the election of three commissioners; that an election was held as required by law after notice thereof; that the freeholders within the

district, by a majority, consented to the creation of the district by a vote of 74 for and 4 against; that, after the commissioners for the district were elected and qualified, an action was brought by such commissioners in the superior court for Pacific county to condemn a right of way for ditches and drains. All the persons interested were made parties to that action, and upon a trial thereof, the court concluded:

"That the scheme now proposed does not contain an adequate outlet, nor any outlet, within the boundaries of the district and the Shoalwater Bay, and that such an outlet is necessary and essential to the practicability of the plan, and that said plan is impracticable and is not feasible."

The court in that case thereupon dismissed the action for condemnation, and ordered that the costs and expenses incurred in forming the district be taxed and assessed against the property situated within the boundaries of the district, and that the commissioners thereof make the necessary assessment as required by law. It was further ordered that, upon the payment of the costs, the district be dissolved. The court, after finding the facts substantially as above indicated, dismissed this proceeding, and the relator appeals from the order of dismissal.

The appellant makes a number of assignments of error in its brief, and argues, chiefly, that the court erred in not finding that the drainage district was improperly organized by reason of the fact that the petition for the organization thereof was not signed by a majority of the freeholders, and that no sufficient notice was given of the hearing before the county commissioners; that the county commissioners, therefore, were without jurisdiction to create a valid district. The appellant relies solely upon imperfections in the petition and in the notices of hearing before the county com-

missioners to invalidate the organization of the district. It is unnecessary to specifically consider these alleged imperfections, because the case is controlled by what was said in *Northern Pac. R. Co. v. Pierce County,* 51 Wash. 12, 97 Pac. 1099, 23 L. R. A. (N. S.) 286. That was a case where the Northern Pacific Railway Company sought to avoid its share of the expenses of forming a drainage district. In that case we said:

"The improvement not having been made, there seems to be no reason in equity why all the lands in the district should not proportionately pay the expenses which were necessarily incurred in determining the question whether the improvement should be made, it being borne in mind that those expenses were not incurred in making an improvement which failed to benefit certain lands, but were expenses preliminary to determining the question above stated, a question entirely foreign to any question of assessment of damages or benefits from or by the construction of the improvement. So that no objection having been made by the appellant at any stage of the proceedings to the formation of the district and the inclusion of their lands in said district, nor to the petition and proceedings under which the decree determined the amount of the indebtedness of the district, the right of appeal from all of such proceedings existing, it is estopped to object to anything but the constitutionality of the law under which the assessment is sought to be made and the tax collected, for it seems plain that the provisions of the law have been complied with."

This rule was approved in *Jackson v. Commercial Waterway District No. 1,* 85 Wash. 301, 147 Pac. 1140.

See, also, *Collins v. Ellensburg,* 68 Wash. 212, 122 Pac. 1010; *Chandler v. Puyallup,* 70 Wash. 632, 127 Pac. 293.

No objections were made to the order of the county commissioners establishing the district when the same was made. No appeal was taken therefrom by any

interested party. When the case for the condemnation of a right of way for certain ditches was brought by the commissioners of the district and was tried, the court therein concluded that the plan of drainage was impracticable and not feasible. No appeal was taken from that judgment. The time has long since gone by when an appeal could be taken therefrom. It is apparent that, if the petition was not signed by the requisite number of freeholders within the district, and if the exact notice required by law was not given, these were mere irregularities which the interested parties in the undertaking might have waived, and did waive when they had notice of all the proceedings and appeared therein and made no objection. These irregularities, if there were any, were waived. In *Collins v. Ellensburg, supra,* we said:

"The lack of a petition was therefore a mere irregularity, and the right to object on that account was waived by the failure of the property owners to protest against the improvement on that ground, in response to the notice given by the declaratory ordinance as published and within the time fixed in that notice."

So it is plain that, if the parties who instigated this proceeding are endeavoring to avoid the payment of the costs of the work done upon the district, they could not do so under the rule announced in *Northern Pac. R. Co. v. Pierce County, supra.* The statute provides, at Rem. Code, § 4150:

"In case the damages or amount of compensation for such right of way, together with the estimated costs of the improvement, amount to more than the maximum amount of benefits which will be derived from said improvement, or, if said improvement is not practicable, or will not be conducive to the public health, welfare and convenience, or will not increase the public revenue, or will not have sufficient outlet, the court shall dismiss such proceedings, and in such case a judgment

shall be rendered for the costs of said proceedings against said district, and no further proceedings shall be had or done therein; and upon the payment of the costs, said organization shall be dissolved by decree of said court."

A decree substantially in compliance with the provisions of this section was entered by the superior court in the action brought by the commissioners of the district to condemn a right of way for ditches. No appeal was prosecuted from that judgment. It has become final and conclusive. All that remains to be done by the commissioners of the district and the county treasurer is to collect the costs which have been incurred and thereupon the district is dissolved. There can be no other object for this action than to avoid the payment of these costs by the parties who petitioned for the district and who, by this action, are seeking to avoid the liability. Clearly, we think, they should not be permitted to avoid the costs by this form of action.

We are of the opinion, therefore, that the trial court properly denied the relief sought. It is unnecessary to consider other points.

The judgment appealed from is therefore affirmed.

MAIN, C. J., HOLCOMB, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14766. Department Two. August 7, 1918.]

SEID CHEE, *Respondent*, v. SANITARY FISH COMPANY, *Appellant*.[1]

CONTRACTS—PERFORMANCE—ACTIONS — EVIDENCE — ADMISSIBILITY. In an action on a contract to furnish Chinese and Japanese laborers, at specified sums per month, in which the intent of the parties that the contractor pay the laborers was shown by the accounts rendered, it is proper to allow the plaintiff to testify that he had paid the various sums to the laborers.

EVIDENCE—BEST AND SECONDARY EVIDENCE—ISSUANCE OF CORPORATE STOCK. In an action on contract, oral evidence that laborers had been paid by the issuance of corporate stock, is properly excluded on the ground that the books of the company are the best evidence.

CONTRACTS—ACTIONS—DEFENSES—ILLEGALITY OF PAYMENTS—WHO MAY ASSERT. In an action on contract to furnish and pay laborers for fish canning, the fact that some of the laborers illegally received part of their pay from plaintiff in intoxicating liquors cannot be asserted as a defense; since only the laborers might raise that question.

Appeal from a judgment of the superior court for Skagit county, Brawley, J., entered January 22, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract, after a trial on the merits. Affirmed.

Geo. H. Rummens, for appellant.

Norvell & Norvell and *Thomas Smith*, for respondent.

HOLCOMB, J.—On February 22, 1915, appellant and respondent entered into a written contract, as follows:

"This agreement entered into this day between Seid Chee, of Portland, Oregon, and the Sanitary Fish Company of Anacortes, Washington, recites: That, for and in consideration of one dollar in hand each to the other paid, the above named parties do contract:

[1]Reported in 174 Pac. 443.

"That the said Seid Chee will act as agent for the Sanitary Fish Company in the hiring of all of the Chinese and Japanese labor for the season of 1915, at the cannery of the said Sanitary Fish Company at Anacortes, and that the said Seid Chee will furnish the board of the said laborers and that the said Seid Chee will in all ways act for and in the interest of the said Sanitary Fish Company as heretofore during the season of 1914.

"In the consideration of the fulfillment of the above named duties, the said Sanitary Fish Company does agree to pay the said Seid Chee the sum of nine ($9) dollars per month for the board of each laborer so employed and further to pay the freight charges on the provisions for such purpose from Portland or Seattle as the case may be. And to provide the necessary wood and water for the China House.

"The said Sanitary Fish Company agrees to pay the transportation for the said laborers from Portland or Seattle, as the case may be, and return.

"The season shall consist of all the time necessary to the canning of the fish and preparing the pack for the market, not to continue, however, later than the 31st day of December, 1916.

"The said Sanitary Fish Company further agrees to pay the said Seid Chee the sum of one and one-half cents per case for each case of salmon packed during the said canning season. The number of cases to be determined by actual case count of the finished pack, and not by the bath room tally.

"The said Seid Chee is to furnish the following laborers for the said Sanitary Fish Company:

Chinese Labor.

July 1, 1915, 1 foreman, five months at $100 per month.
July 1, 1915, 1 cook, season, at $270.
July 10, 1915, 4 butchers, five months.
July 10, 1915, 4 laborers, five months.

Japanese Labor.

July 15, 1915, 1 foreman, five months, at $50 per month.
July 15, 1915, 5 laborers, five months, at $42 per month.
July 15, 1915, 4 laborers, two months, at $50 per month.
July 15, 1915, 5 laborers, four months, at $40 per month.

"The said Sanitary Fish Company further agrees to advance to the said Seid Chee the following advance money:
March 1, 1915, the sum of $500.
May 1, 1915, the sum of $500.
July 1, 1915, the sum of $1,000.

"The said advance money to be used by the said Seid Chee for advances to laborer, provisions and so forth and to be accounted for to the said Sanitary Fish Company by the said Seid Chee.

"Executed in duplicate this 22nd day of February, 1915.

"Signed: Sanitary Fish Company,
"Signed: Seid Chee. By: John D. Carroll,
"Witness: Chas. Show, Pres. and Manager.
"L. B. Carroll."

Respondent employed the laborers who worked for appellant in putting up its salmon pack for 1915. It is agreed that $994.50 for board for the men, and $468 for commission at 1½ cents per case for each case of salmon packed, was due respondent. It was also stipulated at the trial that, at the close of the canning season, there was due and unpaid from the appellant to or on account of the various Chinese laborers employed by the respondent under the contract, the sum of $1,136.33, that respondent paid $8.10 transportation charges, and that $33.30 is due for extra board. Respondent introduced evidence to show that, at the close of the season, there was due him $427 on account of Japanese laborers employed under the contract, against which appellant attempted to prove an offset of $400 for corporation stock. Respondent alleged that, by virtue of the contract, the appellant became and was indebted to him in the sum of $6,148.06, of which amount appellant paid $2,912.83, leaving a balance of $3,277.23 due. Appellant admitted the contract, but denied that respondent had performed his part of it, or that appellant became indebted to him in the sum of

$6,148.06 or at all. The jury returned a verdict of $3,277.23 in favor of respondent.

Appellant contends that the court erred in permitting the respondent to offer testimony that, at the close of the cannery season, he paid the various Chinamen and Japanese the balance due from the company for wages earned.

On reading the contract as a whole, and from a little account book given by appellant to respondent, it is plain that the parties intended that respondent should hire and pay the laborers. The account book, given to and made for respondent, reads as follows:

Sanitary Fish Co. Acc't Seid Chee.
Oriental Wages.

Japanese labor	$1940.68
Chinese labor	1346.33
Total wages	$3287.01
Total board for season	994.50
Commission	468.00
	$4749.51
12-19-1915	1513.68
Balance due	3235.83
Extra board	33.30
Fares paid by Seid Chee	8.10
	$3277.23

Thus, if respondent was to pay the laborers, it cannot be error to permit the respondent's testimony that he had paid the various sums due the laborers.

Appellant attempted to show by oral evidence that it had paid the Japanese labor by the issuance of $400 of its corporate stock. This was objected to by respondent and the objection correctly sustained by the court upon the ground that the books of the company were the best evidence. The assignments of error relating to instructions to the jury have been examined and are not considered meritorious.

Appellant's fifth assignment of error is that the court erred in refusing to withdraw from the consideration of the jury an item of $67.40 for intoxicating liquors supplied by respondent to some of the laborers, as illegal merchandise. It matters not how the respondent satisfied the Japanese laborers, as far as appellant is concerned, whether in money or intoxicating liquors. The Japanese who received the liquor and became indebted to respondent therefor might raise this question, but certainly appellant could not.

There being no reversible error, the judgment is affirmed.

MAIN, C. J., CHADWICK, MOUNT, and MACKINTOSH, JJ., concur.

[No. 14717½. Department One. August 8, 1918.]

FARMERS & MECHANICS BANK *et al.*, *Respondents*, v. WESTERN LOAN & BUILDING COMPANY, *Appellant*.[1]

BANKS AND BANKING—AUTHORITY OF OFFICERS—DEEDS. A deed by a bank president and cashier who were principal stockholders, executed without special authority and acquiesced in by the directors, is within the apparent scope of their authority.

DEEDS—VALIDITY—FICTITIOUS NAME. A deed taken in a fictitious name, with subsequent transfer in such name, passes title and the instruments are valid in the hands of an innocent holder.

MORTGAGES—FAILURE TO RECORD—LOSS. Where the failure to record a mortgage deed enables the title holders to convey under a fictitious name and mortgage to an innocent party, the loss must fall upon the negligent mortgagee.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered January 6, 1917, declaring null and void a mortgage executed under an assumed name and awarding priority to a subsequently recorded prior mortgage. Reversed.

[1]Reported in 174 Pac. 1.

F. Leo Grinstead and *Jas. Ingebritson,* for appellant.

TOLMAN, J.—The respondent on or about the 23d day of July, 1912, made a loan of upward of $2,000 to the First State Bank of Marcus, and took as security therefor a deed to Ortho Dorman, as trustee, to lot 11, block 32, in the town of Marcus, and other property, which deed was not placed of record until September 17, 1914. After the making of the loan and the delivery of the deed, the north forty feet of lot 11, block 32, was conveyed by deed to one James McClure, which deed was placed of record, and on February 16, 1914, the appellant made a loan of $1,200 to James McClure, and took as security a mortgage on the north forty feet of lot 11, block 32, which had been conveyed as stated. Afterwards the First State Bank of Marcus became insolvent and went into the hands of a receiver, respondent's loan became delinquent, and this action was brought for the purpose of having the deeds held by respondent's trustee declared to be mortgages, and for their foreclosure and the application of the proceeds toward the payment of the balance of $1,500 which still remained unpaid upon the respondent's loan to the bank. For the purposes of foreclosure, James McClure, the appellant, the receiver of the bank, and C. W. Barringer, M. I. Barringer, and Paul Barringer were made parties defendant. All defaulted except the appellant, which appeared by cross-complaint seeking the foreclosure of its mortgage, and the receiver; and issues were joined upon the respondent's complaint and the appellant's cross-complaint.

The trial court found that James McClure was a fictitious person, that the mortgage executed by him and held by the appellant was null and void and constituted a cloud upon the title to the north forty feet

of lot 11, block 32, and gave the respondent a judgment and decree of foreclosure accordingly. From this judgment the appeal is taken, and errors are assigned sufficient to raise the questions herein to be discussed.

The particular points to be decided are, first, the question of the validity of the appellant's mortgage, and, second, if valid, is it prior or subsequent to the lien of respondent's mortgage?

Some contention appears to have been made in the court below as to the authority of C. W. Barringer, as president, and M. I. Barringer, as cashier of the bank, to execute the deed to James McClure, conveying the north forty feet of lot 11, block 32. Aside from the authority given to the president and cashier by the by-laws of the bank, which are in evidence, and which probably are sufficient, it appears that the Barringers were the principal stockholders of the bank as well as the officers through whom it transacted all of its business; and as the deed upon which respondent relies was executed by them without any special authority being shown from the directors of the bank, who at all times acquiesced in everything that the Barringers did, it must be held that it was within the scope of their apparent authority to execute the McClure deed. *First Nat. Bank of Kennewick v. Conway,* 87 Wash. 506, 151 Pac. 1129.

The receiver's answer to the cross-complaint alleged that McClure was a dummy used by Barringer to defraud the bank, and that McClure was a fictitious person nonexistent at the time of the execution of the mortgage. Upon a careful study of the record, we find that the evidence amply supports these allegations. This being so, it follows from all the evidence in the case, that James McClure was the name adopted by C. W. Barringer for the purpose of the manipu-

lation of the affairs of the bank. And the effect of the deed was to vest title to the property conveyed in Barringer. In *Chapman v. Tyson,* 39 Wash. 523, 81 Pac. 1066, we had occasion to consider the effect of taking title in, and conveying by, an assumed or fictitious name, and after reviewing the authorities at some length we there held that title would so pass. It follows, therefore, that the title being vested in Barringer under the fictitious name of McClure, the mortgage and note made by Barringer under that name and delivered by him to the appellant were valid instruments in the hands of an innocent holder.

It appears from the record in this case that the appellant relied absolutely upon the record title in its acceptance of the mortgage made in the name of McClure and the advancement of the money thereby secured, and had no knowledge or notice of any fact which would put it upon inquiry, either as to respondent's rights under its then unrecorded deed, or the wrongdoing of Barringer; and as respondent might by a timely recording of its deed have not only perfected its rights, but also have put it beyond the power of Barringer to further deal with the property, and thus have prevented loss to the appellant, a familiar rule of equity applies to the effect that as between two innocent persons the one whose act or omission made possible the wrong shall bear the loss.

The judgment will be reversed, with directions to the trial court to enter a decree establishing the appellant's mortgage as a first lien upon the property therein described and directing its foreclosure.

MAIN, C. J., MITCHELL, PARKER, and FULLERTON, JJ., concur.

[No. 14804. Department One. August 8, 1918.]

EDENDALE LAND COMPANY *et al., Appellants,* v. JAMES G. CORTELYOU *et al., Respondents.*[1]

CANCELLATION OF INSTRUMENTS — JUDGMENT — RELIEF GRANTED. In granting cancellation of deeds and rescission of a trade of properties, including much personal property, after the lapse of two years, during which changes occurred in the property and its market value, it is not error to refuse to decree a return of the personal property to the plaintiff, where there was no evidence upon which a fair valuation can be placed thereon; especially where there was such confusion in the pleadings that there was no admission as to the present value of any of the personal property involved, and no evidence as to what personalty remained on the place and was covered by the decree.

Appeal from a judgment of the superior court for Stevens county, Blake, J., entered August 29, 1917, decreeing rescission of contracts for the exchange of real and personal property, granting defendants a money judgment against plaintiffs, and refusing to award plaintiffs the return, or the value, of certain chattels disposed of by defendants. Affirmed.

D. R. Glasgow and *Charles Grant,* for appellants.

L. C. Jesseph, for respondents.

MITCHELL, J.—Appellant, Edendale Land Company, is a corporation the capital stock of which is owned by appellants T. Waldo Murphy and wife. On August 17, 1915, appellants were the owners of a farm called Edendale, consisting of 560 acres, together with improvements and personal property situate thereon, in Stevens county, Washington. At the same time, respondents, James G. Cortelyou and wife, were the owners of several tracts, parcels and lots of real prop-

[1]Reported in 174 Pac. 445.

erty situate in southern California. On that day the parties exchanged properties, the instruments of conveyance expressing nominal considerations. In their negotiations each placed what, for a better name, may be termed a trade value upon his total property, largely in excess of its actual value, according to which plan it appears that appellants' personal property was listed at $20,000, although the bill of sale by which it was conveyed to respondents mentions the consideration of $10. There were a great many articles of personal property disposed of by appellants in the deal, consisting of hay, grain, pipe factory machinery and tools, a small sawmill, engines, boilers, pumps, gasoline spray pump, plumbers' tools, wagons, buggies, harness, sleds, farm machinery and small tools, furniture, several hundred hogs, lumber, merchandise, etc. Each party took possession of the property thus acquired. Subsequently, and prior to November 15, 1915, there were between the parties money transactions of minor importance and some payments made to protect or care for property, or collections made from third parties on account of outstanding obligations transferred by the deal between the parties to this suit. Appellants, becoming dissatisfied and claiming to have been defrauded, served notice of rescission on respondents and offered restitution on November 15, 1915, which was not agreeable to respondents. Appellants promptly commenced suit for rescission and incidentally for certain damages consisting of expenses to California, cost of abstracts, etc. The case was tried some eighteen months thereafter, the judgment being entered August 29, 1917. It appears that, at the time of the commencement of the action, respondents had already disposed of some of the personal property, and, later on and before trial, because of distraint and sale for taxes or voluntary sales, other personal property was disposed

of. The judgment of the trial court canceled the contracts and restored to appellants their lands. As to the dealings and obligations based on transactions occurring between the date of the exchange of properties and the date of trial, the court found and adjudged in favor of respondents Cortelyou and wife in the sum of $1,770, and refused appellants anything on account of expenses in going to California and the cost of abstracts. As to the personal property which was sold by respondents, the judgment provided as follows:

"It is further ordered, adjudged and decreed, that that certain bill of sale dated the 17th day of August, 1915, and recorded in the office of the county auditor of Stevens county, Washington, on the 21st day of August, 1915, in book E of bills of sale at page 254 of the records of bills of sale be and the same is hereby declared to be fraudulent and void, and it is hereby rescinded, canceled of record and held for naught and plaintiffs are hereby adjudged to be the owners of all of said chattels remaining at Edendale free from any claim of the defendants or any one claiming by, through or under them."

From such judgment, Cortelyou and wife or any of the other defendants do not appeal. Appellants, plaintiffs below, appeal from that portion of the judgment providing for a recovery in the sum of $1,770 against them and in favor of Cortelyou and wife; also from that portion of the judgment awarding to appellants only those chattels remaining at Edendale rather than all of the chattels formerly at Edendale included in the original conveyance, or the value of the same; and also from the refusal of the court to allow damages against Cortelyou and wife for appellants' expenses in going to California, costs of abstract, etc.

The record in this case is voluminous. The pleadings consist of over 125 typewritten pages, thus indicating somewhat the great number of things inquired into

and disposed of. In such circumstances, it is not an easy thing for a judge, after determining there shall be a cancellation of instruments, to say, with that precision which shall satisfy all minds, what shall be done by way of adjustment and restoration, especially in such case as the present one, where, during the two years which elapsed after the date of the contracts until the entry of judgment in the case, it appears that sometimes with, and other times without, fault, changes occurred in the property itself, as well as the market value thereof, difficult of measuring in dollars. An examination of the record, the labor of which has been greatly reduced by an unsupplemented abstract of the evidence, indicates the care bestowed on the case by the trial judge, whose judgment in every respect complained of is referable to, and finds support in, the proof by a preponderance thereof.

Appellants, however, contend that as the court awarded rescission, thus necessarily finding respondents Cortelyou and wife at fault, appellants should have been given judgment for return of the personal property or its value of $20,000. Not necessarily so, when all the conditions and circumstances as they existed at the time of the trial are considered. But suppose it be admitted, for argument's sake, that equity required such adjustment as was made as to all rights other than the personal property and that appellants should have been given the personal property or its value, it is still obvious that appellants have as favorable a judgment in this respect as the pleadings and proof justify. The trial judge, in deciding the case, very correctly remarked on this point:

"Nothing is allowed plaintiff on account of personal property lost or sold since the trade to defendant. This for several reasons, but one will suffice, that is, there is no evidence upon which a fair valuation can be

placed upon such personal property. Of course plaintiffs' contention that they are entitled to $20,000 on this account is absurd. This was a *trade* value and unquestionably was grossly exaggerated."

With such opinion in view, and to meet it, counsel for appellants call attention to what is claimed to be an admission in the pleadings. In the amended complaint it is alleged in substance that, in pursuance of the terms of the exchange of properties, plaintiffs made, executed and delivered to defendants a bill of sale conveying goods and chattels being then and there of the agreed value of $20,000 and were a part of the original consideration of $158,742 comprising the agreed value of plaintiffs' property transferred to defendants, etc. Answering this, respondents especially deny that said chattels were of the agreed value of $20,000, or any other sum in excess of $10,000. As to these averments, respondents argue with some show of reason that they refer only to what the parties had in mind as *trade* values at the time of the exchange, which values, without question, as to both parties were greatly excessive. But let that be as it may, appellants overlook the fact that in their second supplemental complaint it is alleged, with reference to at least a portion of these chattels, as follows:

"That at the time of said exchange in August, 1915, there was delivered to the defendants herein, among other things, tools and equipment aggregating $3,948; live stock of the value of $2,130; stock of merchandise, grain, hay and potatoes, aggregating $1,342, all of which defendants have sold and converted the proceeds thereof to their own use,"

which allegations respondents by their answer deny.

Thus there appears such confusion on this matter by the pleadings that it cannot be said there is any admission as to the present value of any or all of the

personal property involved. However, while it is true that Murphy, in answer to the question, whether the chattels or any part of them which were sold by him to Cortelyou had ever been tendered or offered back to him, replied in the negative; and while it is also true that Murphy did testify that the value of all of the personal property was $20,000, it is true, nevertheless, that a part of the personal property was not disposed of after respondents took possession thereof, for the decree in this case, after setting aside and canceling the bill of sale, adjudges appellants "to be the owners of all of said chattels *remaining at Edendale* free from any claim of defendants." There is no proof as to the value of the goods *remaining* at Edendale, nor of those that had been disposed of, and hence no basis upon which to figure a money judgment, even if it be admitted that the value of all was $20,000 or $10,000, and that appellants would otherwise be entitled to recover therefor.

We are not unmindful of the assault made by respondents upon the abstract and also upon the certificate to the statement of facts in this case, but our disposition of the cause on the merits obviates any necessity for deciding such motions.

Judgment affirmed.

MAIN, C. J., PARKER, FULLERTON, and TOLMAN, JJ., concur.

[No. 14807. Department One. August 8, 1918.]

WALLA WALLA OIL, GAS & PIPE LINE COMPANY, *Appellant*, v. J. B. VALLENTINE *et al.*, *Respondents*.[1]

FRAUDS, STATUTE OF—CONVEYANCE OF REAL ESTATE—OIL AND GAS LEASE. An oil and gas "lease" permitting the licensee to search and dig for oil and gas and appropriate the same upon payment of a royalty, creates only an incorporeal hereditament or chattel interest, in no manner proscribed by the rules against conveyances or incumbrances of real estate except by writing; hence the real beneficiaries may be shown by parol.

CORPORATIONS—REPRESENTATION BY OFFICERS—NOTICE—BONA FIDE PURCHASER. A corporation taking oil and gas leases from its officers who had full notice of adverse rights of third persons is not an innocent purchaser.

Appeal from a judgment of the superior court for Spokane county, Geo. H. Armitage, Judge *pro tempore*, entered September 26, 1917, upon findings in favor of defendants in an action to establish a trust in oil and gas leases, tried to the court. Reversed.

Guy B. Groff and *Daniel K. Zimmerman*, for appellant.

MITCHELL, J.—Appellant, plaintiff, a corporation, was organized in April, 1916, and is engaged in procuring oil and gas leases for the purpose of developing the properties for the production of oil and gas. About the date of organization, defendant employed one Arthur C. Harris, a stockholder, to act as its agent in securing oil and gas leases. It was considered advisable to take the leases in the name of Harris, who later should assign them to the company. Thus acting, Harris obtained a number of such leases in Benton county. All money needed therefor, including the ex-

[1]Reported in 174 Pac. 980.

penses of Harris, was paid by the company. A part of the paper interest of Harris in some of these leases was assigned by him as directed by the company. A dispute arose between them as to the remainder. Harris claimed he owned a portion of them, while the company held he had no beneficial interest in any. Notwithstanding several conferences and demands, Harris refused to assign any of them. Respondent J. B. Vallentine had already had correspondence with the appellant in regard to selling its stock, and about the time Harris commenced to deny any rights of the company in the leases Vallentine and Harris planned, and were forming, a corporation known as Spokane Benton Oil and Gas Company. Through his association with Harris and conferences with the officers of the appellant, Vallentine learned of the trouble about the leases, and, being told by the appellant they were its property, Vallentine was unwilling to take an assignment of the leases from Harris, as he and Harris had planned, to the corporation just formed by him and Harris, and, reminding appellant of his close relations with Harris, entered into an arrangement with appellant by which, in consideration of stock to be given him and his being made a director later on, he would mediate a settlement between appellant and Harris. Pursuant to their plan, appellant agreed to, and did, prepare a complaint in a suit against Harris, of which he was advised, to establish its ownership of the leases, whereupon, and by active negotiations, Vallentine succeeded within a few days in adjusting the dispute with Harris, by which, with the approval of appellant, Harris retained a small part of the leases and assigned the rest to Vallentine. A written acquittance of all liability was given to Harris by appellant. Appellant also dropped its suit against Harris. At the exchange and delivery of these papers, Vallentine

represented appellant. On taking assignments from Harris, it was understood by him, Vallentine and appellant that, while they were taken in Vallentine's name, the transaction was for the benefit of appellant. The assignment was delivered by Vallentine to an officer of the appellant corporation, who had it recorded at the expense of appellant in the office of the auditor of Benton county. The reason the assignment was taken in Vallentine's name was to facilitate his efforts in a scheme by which the S. U. Hale Company should, if possible, be induced to become interested by the use of its machinery and appliances in developing this gas and oil field for appellant. Later, and prior to April 1, 1917, it was ascertained the S. U. Hale Company would not become interested. In the meantime, and during February and the early part of March, 1917, respondent J. D. O'Brien and one H. H. Alvis, noticing the activities of appellant, Harris, and Vallentine, learned through conferences with appellant's officers and Harris that all leases assigned by Harris to Vallentine were as a fact the property of appellant. However, later on, and about March 17, 1917, respondent Spokane Wyoming Oil & Gas Company, a corporation, was organized at the instance of O'Brien and Alvis, with them as two of its principal officers. On March 24, 1917, Vallentine assigned to O'Brien one of the leases theretofore assigned to him by Harris, and on the same day O'Brien reassigned it to his company, Spokane Wyoming Oil & Gas Company. On several occasions prior to the present action, and after failure to interest the S. U. Hale Company, appellant offered to deliver to Vallentine the amount of stock he was entitled to according to agreement, and demanded of Vallentine an assignment to it of the leases assigned by Harris to him, appellant having already waived its

right of action against Harris on account of procuring assignments from Harris to Vallentine. This demand was positively refused by Vallentine, who denied that appellant ever had any right in the gas and oil contracts. The contracts involved are spoken of as being the common kind of oil and gas leases which permit the lessee (so-called) for a term of years to go upon the land to prospect for oil and gas, mine, and operate tanks, power stations, oil and gas pipe lines, etc., upon a royalty basis or part interest in the output.

This action was commenced about April 16, 1917, for a judgment declaring defendants to be the holders in trust of the title to the property involved. Defendants answered, denying generally, upon which pleadings a trial was had, resulting in a dismissal of the cause of action upon the theory that the case was one in which plaintiff was seeking to establish by oral testimony an express trust in real estate, the trial judge remarking that such procedure is not permissible under our statute, although being entirely satisfied by a preponderance of the evidence that the appellant would be entitled to a judgment if nothing more than chattel interests were involved. The Walla Walla Oil, Gas & Pipe Line Company, a corporation, plaintiff below, appeals.

Because of the supposedly migratory character of oil and gas, which are not fixed in place like coal and other solid minerals, such contracts as those involved in this case convey no interest in, nor create any incumbrance upon, the land or any oil or gas found therein. The land is still to be considered in the possession of the grantor; the contract amounts only to a license entitling the licensee to search and dig for oil and gas according to the terms of the grant, and appropriate the produce to his own use on payment of

the royalty or proportion without acquiring any property in the minerals until they are severed from the land. They create only an incorporeal hereditament—a right issuing out of or concerning land. Such contract establishes a mere chattel interest, in no manner under the proscription of any rule, statutory or otherwise, against conveyances or incumbrances of real estate or other interests except by writing. The real beneficial owner of such property right may be shown by parol. *Funk v. Haldeman,* 53 Pa. St. 229; *Aaron v. Rothrock,* 102 Kan. 272, 169 Pac. 1161; *Smith v. Root,* 66 W. Va. 633, 66 S. E. 1005, 30 L. R. A. (N. S.) 176; *Richlands Oil Co. v. Morriss,* 108 Va. 288, 61 S. E. 762.

As to the leases assigned to O'Brien and thence to Spokane Wyoming Oil & Gas Company, respondents O'Brien and Spokane Wyoming Oil & Gas Company claim they are entitled to protection as innocent purchasers. There is some proof from interested parties in favor of such claim, but we are satisfied by the clear preponderance of the evidence that, prior to the transfer to O'Brien by Vallentine, O'Brien and Alvis had full information of appellant's rights and that the respondent corporation, which was shortly formed by O'Brien and Alvis as its leading spirits and officers, is chargeable with that notice and entitled to no protection.

Appellant confesses, however, that Vallentine was to receive some of its stock for his services in adjusting its dispute with Harris, the amount of which we are not advised by the record. This amount will be ascertained by the trial court and, upon delivering it to Vallentine or depositing it in court for him, the trial court will decree a conveyance or assignment to appellant by respondents of all oil and gas leases held by them and mentioned in this cause.

Reversed and remanded with instructions to proceed as herein directed.

MAIN, C. J., PARKER, TOLMAN, and FULLERTON, JJ., concur.

[No. 14628. Department Two. August 13, 1918.]

GEORGE W. CHUTE *et al.*, *Appellants*, v. ARTHUR J. BROWN *et al.*, *Respondents*.[1]

LANDLORD AND TENANT—LIEN ON CROP—NOTICE—PRIORITY—BONA FIDE PURCHASER. A landlord's lien upon crops for rent, under Rem. Code, § 1190a, applying the provisions of chapter 7 relating to liens upon logs, depends upon the filing of a lien notice prior to sale to a bona fide purchaser, notwithstanding the provision that the lien may be asserted within forty days after expiration of the term or each year of the lease; since the lien may be protected by filing notice at any time.

Appeal from a judgment of the superior court for Yakima county, Davidson, J., entered August 1, 1917, dismissing on the merits, an action in equity, tried to the court. Affirmed.

Parker, LaBerge & Parker, for appellants.

Stephen E. Chaffee, for respondent Rowland.

Harold B. Gilbert and *O. L. Boose*, for respondent Balcom.

CHADWICK, J.—Appellants brought this action to foreclose a landlord's lien and to recover the value of certain parts of a crop sold by the tenant Arthur J. Brown to F. M. Balcom, Ide & Son, and Rowland & Son. The lease was executed on March 1, 1916, and was for a period of eleven months, commencing March

[1]Reported in 174 Pac. 438.

1, 1916, and ending on February 1, 1917. The property was community property. The lease was not signed by the wife, nor was it acknowledged by either of the parties.

A crop was raised during the season of 1916 and a part of the landlord's share was sold by Brown to the several other defendants. Appellant George W. Chute had knowledge of these sales as early as the 2d or 3d of November, 1916. On January 8, 1917, he filed for record in the office of the county auditor of Yakima county a claim of lien upon all the crops grown on the leased premises during the season of 1916. The court below, as we are informed, denied a recovery upon the ground that the lease, being informal and not entitled to record under the recording acts, was not notice of the right of the landlord to claim an interest as against *bona fide* purchasers for value. This court has frequently and persistently held that an unacknowledged lease is operative only as a lease from month to month or from year to year. It has as persistently held that a lease of community property which is not signed or acknowledged by a wife is not valid as an executory contract. But we find no cases in which it is held that third parties, whether *bona fide* purchasers for value or subsequent incumbrancers, can set up the invalidity of a lease as against the right of a landlord to assert a lien upon crops grown while the tenant was in the actual and undisturbed possession of the premises, and it may well be doubted whether there are any. *Hill v. Gilmer,* 21 South. (Miss.) 528, seems to so hold, but, if so, it is not sustained by the authorities upon which it is made to rest. There are cases to the contrary. *Martin v. Blanchett,* 77 Ala. 288; *Nelson v. Webb,* 54 Ala. 436. It would seem that the right of a landlord to assert a lien under the statute arises out

of the relation and not out of the written contract, which, under the logic of our decisions, if informal, goes only to the extent or duration of the term, and not to the particular covenants relating to the rent to be returned, whether it be in money or in the products of the land. We therefore leave this question undecided and pass to an affirmance of the judgment of the court upon another ground.

At common law a landlord has no right of lien upon the crops of his tenant. 16 R. C. L. 975. The right has been asserted and sustained, however, upon equitable considerations, custom and usage being recognized as sufficient to support the lien and to maintain trover. In some of the states the right to assert a lien is secured by statute, and is made to depend upon a statutory notice. It is so in this state. Rem. Code, Title VIII, ch. IX (§§ 1188-1190).

Under § 1190a, being a part of the chapter securing liens upon farm products, it is provided:

"All rights secured to the holders of liens upon logs under the provisions of chapter VII, shall inure to the benefit of those holding liens under the provisions of this chapter, and the said lienholders hereunder, shall have the same right to have their liens recorded, the same right of foreclosure, of joinder of parties, of judgment over against the person primarily liable, and against any person who shall injure or impair their lien or any of their rights, as are above secured to the holders of liens upon logs, under said Chapter VII."

Under this section we are warranted in referring to the law providing for the assertion and maintenance of liens upon logs and to our own decisions construing Rem. Code, ch. VII of Title VIII (§§ 1162-1181).

This action, in so far as it is maintained against the purchasers of the farm products, is for the eloignment of the property. Under the logging lien statute, it has

been held from the beginning that an action for the eloignment of logs cannot be maintained if a sale is made before the filing of the lien. *Akers v. Lord*, 67 Wash. 179, 121 Pac. 51; *Robins v. Paulson*, 30 Wash. 459, 70 Pac. 1113; *O'Connor v. Burnham*, 49 Wash. 443, 95 Pac. 1013; *Judge v. Bay Mill Co.*, 18 Wash. 269, 51 Pac. 378.

We come to this conclusion notwithstanding the provision that a landlord shall have a lien upon the crops grown or growing upon the demised land for any year for the rents accrued, or accruing for such year, and a further provision that the landlord may assert his lien by filing his claim within forty days *after* the expiration of the term, or forty days after the expiration of each year of the lease.

This conclusion saves a question that has aggravated other courts and has led to a distinction that has no foundation in reason when applied to a state of facts such as we are called upon to consider.

The authorities are not in accord upon the question whether the lien given by statute is enforceable against a *bona fide* purchaser without notice, although it is generally held that no lien can be enforced against a purchaser of stock in trade sold in the ordinary course of business. We may well take notice that farm products are raised in quantity in this state and are generally sold on the market at or following nearly the harvest time, and that a tenant has either an entire interest, if he pays a cash rent, or a partial interest, if he pays in kind.

Crops are articles of commerce, and care should be exercised that no unjust restraint be put upon fair trade by those accustomed to deal therein. And while we hold that a landlord has a lien upon crops for his rental, and that it is a prior and preferred lien, priority

and preference depend upon notice. The lien given by our statute is not general as in some states, but is a right to be exercised at the option of the landlord, and, until exercised by the filing of a claim of lien as provided in the law, it will not operate to defeat purchasers in good faith. In other words, notice does not arise out of the tenancy, but by the assertion and filing of a claim of lien. This rule works no hardship upon a landlord, for he may protect his right from the beginning by filing a claim at any time but not later than the time limited by law. *McLeod v. Russell,* 59 Wash. 676, 110 Pac. 626; *Cascade Lumber Co. v. Aetna Indemnity Co.,* 56 Wash. 503, 106 Pac. 158.

Taking the act, the loggers' lien law, and our own cases, we have no doubt that it was the intention of the legislature to make a landlord's lien depend upon a filing of his claim and that such filing is necessary in order to defeat the right of a purchaser for value.

Affirmed.

MAIN, C. J., MOUNT, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14697. Department One. August 13, 1918.]

DIAMOND ICE & STORAGE COMPANY, *Appellant*, v. KLOCK PRODUCE COMPANY, *Respondent*.[1]

JUDGMENT—RES JUDICATA—MERGER OR BAR—MATTERS THAT MUST BE DETERMINED. In an action for storage charges, defendants' former suits for the recovery of goods stored and for damages for goods spoiled while in storage, in which there was no counterclaim or set-off for the storage charges, are not *res judicata* of the subsequent action, since the issue for storage charges is not so closely related to the issues in the former actions as to require that it be determined therein.

SAME—MERGER AND BAR—ANSWER—SET-OFF AND COUNTERCLAIM AVAILABLE IN FORMER ACTION. Rem. Code, § 264, providing that the answer "must contain" (1) a general or specific denial; (2) any new matter constituting a defense or counterclaim, which counterclaim by Id., § 265, must be one arising out of the contract or transaction set forth in the complaint or connected with the subject of the action, or, in actions on contract, any other cause arising on contract, is not mandatory in the sense of requiring the pleading of a counterclaim which is wholly unrelated to plaintiff's claim; but the two subdivisions of § 264 present merely alternatives as to unrelated claims.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered December 10, 1917, dismissing an action on contract, upon sustaining defendant's demurrer to the reply. Reversed.

James B. Howe and *A. J. Falknor*, for appellant.

Samuel H. Steele, for respondent.

PARKER, J.—The plaintiff, Diamond Ice and Storage Company, seeks recovery of the sum of $402 claimed as a balance due it from the defendant, Klock Produce Company, for the storage of cheese, butter and eggs, between March 20, 1914, and April 23, 1915. The case was disposed of by the superior court upon the pleas of

[1]Reported in 174 Pac. 435.

res judicata, pleaded in the defendant's second and third affirmative defenses, and plaintiff's reply thereto. The defendant demurred to the plaintiff's reply, which demurrer was sustained by the court, and the plaintiff having elected to stand upon its reply and not plead further, judgment of dismissal was rendered against it, from which it has appealed to this court.

The questions here to be determined are: (1) does plaintiff's reply negative the defendant's plea that the claim of appellant here sued upon was actually put in issue by the defendant and adjudicated in either of the two prior actions mentioned in the second and third affirmative defenses; and (2) does appellant's reply negative the defendant's plea that the claim of appellant here sued upon was in any event, in legal effect, adjudicated in either of those actions, because of the fact that it was so closely related to the issue therein involved as to estop appellant from asserting that it was not adjudicated by the judgment rendered therein? To avoid confusion we shall refer to appellant as the storage company, and to respondent as the produce company.

The complaint of the storage company in this action is in the simplest form and contains only those allegations necessary in such cases. It does not specifically inform us whether the balance of $402 claimed as owing to the storage company by the produce company is a balance due upon a single or upon several storage contracts. It does, however, inform us that the account sued upon consists of numerous separate charges for storage at different times, of different lots of produce.

It appears from the allegations of the produce company's second affirmative defense that, on August 5, 1915, it commenced an action in the superior court for King county, seeking recovery from the storage com-

pany of the value of fifty-four cases of cheese which it had in storage with the storage company and which it claimed that company had converted. We shall assume that the further allegations, as to the issue tendered in that action and judgment rendered therein, stated a good defense of *res judicata* in this action.

It appears from the denials, admissions and allegations of the storage company's reply to this second affirmative defense, as follows: The storage company in its answer in that action admitted that it had received the cheese in storage for the produce company, and that the contract of storage was evidenced by a negotiable warehouse receipt, and further pleaded as an affirmative defense therein, as follows:

"This defendant [the storage company] alleges that between March 20, 1914, and May 23, 1915, this plaintiff had in storage with the defendant various quantities of eggs, butter and cheese and that on April 23, 1915, and all times since there was due this defendant from the plaintiff for the storage of such eggs, butter and cheese, the sum of four hundred and sixteen and 5/100 dollars ($416.05), no part of which has been paid. That this defendant on the 22nd day of April, 1915, refused to surrender and deliver said fifty-four (54) cases of cheese, being the only article of plaintiff then, or since, in storage with the defendant, for the reason that the plaintiff failed and refused to pay the storage charges of four hundred and sixteen and 5/100 dollars ($416.05) due this defendant from the plaintiff on said 23rd day of April, 1915, and at all times since due and unpaid. That this defendant stands ready and willing, and at all times has stood ready and willing, to deliver to the plaintiff, or the plaintiff's assignee, said fifty-four (54) cases of cheese upon the payment to this defendant said storage charges of four hundred and sixteen and 5/100 dollars ($416.05), and that this defendant has not converted said cheese or any part thereof to the defendant's use, but holds the same solely by virtue of its warehouseman's lien."

The storage company, in its answer in that action, did not set up its claim of $416.05 as a set-off or counterclaim against the produce company's claim for the alleged conversion of the cheese, but set up that claim only as a justification for withholding the cheese and refusing to deliver it to the produce company upon the surrender of the negotiable warehouse receipt evidencing the contract of storage, and the tender of payment of $6.61, claimed by the produce company to be all that was due to the storage company for the storage of the cheese under that contract of storage. The prayer of the storage company in its answer was simply that the action be dismissed, and for its costs. It did not ask for recovery of the storage charges claimed by it for the storage of the other produce; but on the trial of the cause, upon the merits, the storage company moved for permission to amend its answer so as to ask for equitable relief, and that its claim for storage of the other produce, as well as the cheese in question, be declared a lien upon the cheese and that it be sold to satisfy such lien. This amendment was permitted, and at the close of the case the trial court denied to the produce company recovery for conversion of the cheese and awarded foreclosure of the claimed lien of the storage company as against the cheese. Thereupon the produce company appealed from that judgment to this court, and thereafter this court reversed the judgment so rendered, with directions to the trial court to enter a judgment in favor of the produce company against the storage company in the sum of $812.92, the value of the cheese retained and converted by it. It was pointed out in our decision that no set-off or counterclaim was pleaded as a defense in that action, and that "all that the defendant [the storage company] set up was that it had a right to retain the cheese under its lien." The theory of that decision was that the storage company

did not have a lien upon the cheese in question, for storing the other produce. See *Klock Produce Co. v. Diamond Ice & Storage Co.*, 90 Wash. 67, 155 Pac. 414. The denials in the storage company's reply to this second affirmative defense plainly negative the alleged adjudication, either actually or constructively, of the claim here sued upon.

It appears from the allegations of the produce company's third affirmative defense as follows: In October, 1915, the produce company commenced another action in the superior court for King county against the storage company, seeking recovery of damages, the depreciated value of 1,124 cases of eggs which it had stored with the storage company, claiming that the eggs had been spoiled by reason of improper storage. The trial of that action upon the merits resulted in the awarding of judgment in favor of the produce company against the storage company in the sum of $900, which action was pending in this court upon appeal at the time of the commencement of this action. We here note that the judgment rendered therein has since then been affirmed by this court. See *Klock Produce Co. v. Diamond Ice & Storage Co.*, 98 Wash. 676, 168 Pac. 476. The claim of the storage company here sued upon was in no way referred to or claimed as a defense by way of set-off or counterclaim as against the damage claim of the produce company in that action. That adjudication is pleaded in this action, however, as the produce company's third affirmative defense of *res judicata*, accompanied by allegations in an attempt to show that it was so closely related to the produce company's claim of damages in that action that it became, in effect, adjudicated by the judgment rendered therein, in the sense that the storage company is estopped thereby from now asserting that it was not so adjudicated.

It appears from the denials, admissions and allegations of the storage company's reply to this third affirmative defense, as follows: The storage company denies all the allegations of this affirmative defense, except it admits that the issues determined by the judgment rendered in the action therein referred to were as shown by the pleadings therein, copies of which are made a part of its reply. Plainly, those pleadings do not show that the claim of the storage company here sued upon had any relation to the issues raised by the pleadings or determined by the judgment rendered in that action.

Assuming that the denials and allegations of the storage company's reply in this case are true, as we must assume for present purposes, we first inquire, was the claim of the storage company actually put in issue and adjudicated upon as a set-off or counterclaim in its defense made in the first action? We have seen that, according to the allegations of the storage company's reply to the produce company's affirmative defense in this action, its storage claim was set up in that action only as a claimed lien for storage upon the cheese there in question, and as a justification for the refusal to deliver the cheese to the produce company; that no personal judgment upon the claim was sought against the produce company; and that it was finally decided in that action that the storage company had no enforcible lien against the cheese converted by it. The storage company's reply, in effect, goes further and denies that its claim here sued upon was the claim sought to be enforced as a lien in that action. Plainly, the allegations of the storage company's reply negative the allegations of the produce company's second affirmative defense, in so far as that defense pleads that the claim here sued upon was actually litigated therein. What the proof may show upon the trial of the issues

in this action, is another question. It follows that the storage company's reply to the produce company's second affirmative defense is good as against the produce company's demurrer. What we have already said calls for the same conclusion with reference to the storage company's reply to the produce company's third affirmative defense.

Was the claim of the storage company here sued upon so closely related to the issues determined in the two former actions that it was, in legal effect, adjudicated in either of those actions? It seems to us that it cannot be so determined from the pleadings in this action, in view of the denials and allegations of the storage company's reply. What we have already said, we think, renders further notice of this question unnecessary.

Was the storage company bound to actually plead and put in issue in either of the former actions, as a set-off or counterclaim, its claim here sued upon, or be thereafter estopped from asserting it in this separate action? It is here so contended by counsel for the produce company, upon the theory that it was at the time of the commencement of the first of these actions a claim arising upon contract, then existing in favor of the storage company and against the produce company, between whom a several judgment might have been had in one or the other of those actions. This contention is rested upon the provisions of the following sections of Rem. Code:

"Sec. 264. The answer of the defendant must contain,—

"(1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;

"(2) A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition."

"Sec. 265. . . . The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:—

"(1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

"(2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

It is argued that the words, "the answer of the defendant must contain," as used at the beginning of § 264, rendered it mandatory upon the storage company, as defendant in the two former actions, that it actually plead and put in issue in one or other of those actions, as a set-off or counterclaim against the claims therein sued upon, its claim here sued upon, even though this claim is one arising wholly independent of the claims therein asserted. Our recent decision in *Deaver v. Trahey,* 98 Wash. 63, 167 Pac. 68, seems to answer this contention. We there held that the note sued upon, not having been actually set up as a counterclaim or set-off by way of defense in the former action, the judgment in which was pleaded as *res judicata,* the note having been given in settlement of a matter wholly independent of the matter involved in that action, and the holder of the note being the original payee, he was not estopped from thereafter suing thereon in an independent action. In our decision in that case we said:

"This note constitutes a cause of action in favor of appellant and against respondent wholly independent of all matters drawn in question in that action. It

being clear that this note was not in fact drawn in question in that action, either by pleadings or evidence, the question here is, Was it necessarily involved therein in the sense that the judgment to be rendered in that action would become *res judicata* of appellant's right to recover in this action upon the note? It seems settled by the great weight of authority, in the absence of statute, that a defendant, having a cause of action against a plaintiff wholly independent of the claim and relief sought by the plaintiff in the particular action, is not bound to set up such independent cause of action as a defense in the action, even though his cause of action is such that he may be permitted to do so, but may bring an independent action to enforce his claim without being subjected to the plea of another action pending or of *res judicata* as a defense thereto."

It is true it was not suggested in argument in that case that § 264, above quoted, is mandatory in the sense here claimed by counsel for the produce company, but we think the holding in that case would have been the same had such argument been made therein. It will be noticed that the two subdivisions of § 264, stating what the answer *must* contain, are not joined by the conjunction "and" nor are they separated by the disjunctive "or." Reading the two sections as a whole, it seems quite clear to us that these two subdivisions of § 264 are merely alternatives, and that, in answering, a defendant may plead one or the other and is not bound to plead as a defense any counterclaim or set-off which he may have against the plaintiff, and which is wholly unrelated to the claim of the plaintiff. This, we think, is in harmony with the overwhelming weight of authority. It seems to us that these sections of the statute do not evidence a legislative intent to make the law otherwise. In *Bertles v. Hawkins Motor Car Co.*, 94 Wash. 680, 163 Pac. 3, observations are made quite in harmony with this view, though we do not cite that case as being exactly in point.

We have not lost sight of our decision in *Perlus v. Silver,* 71 Wash. 338, 128 Pac. 661, cited by counsel for the produce company, from which he quotes as follows:

"It is the settled law of this state that, in an action between the same parties, a judgment therein is *res judicata* as to all points in issue, and also as to all points which might have been raised and adjudicated in such action."

This is but the statement of a general rule which, it seems to us, has always been subject to the exceptions noticed in *Deaver v. Trahey,* in the absence of a statute expressly providing otherwise. In *Perlus v. Silver,* however, the second action was brought upon a claim which was manifestly so closely related to the one adjudicated upon in the former action as to necessarily become *res judicata* by the judgment rendered therein; and the same may be said of all the cases decided by this court, cited following the language above quoted from in *Perlus v. Silver.*

We are of the opinion that, in view of the denials and allegations contained in the storage company's reply to the second and third affirmative defenses of the produce company in this action, it cannot be decided upon the pleading, that the claim of the storage company here sued upon has been actually adjudicated in either of the former actions, or that it is such a claim that, at the commencement of either of those actions, the storage company was bound to plead or in any manner put it in issue as a set-off or counterclaim in either of those actions; or suffer estoppel from thereafter seeking recovery thereon in this independent action.

The judgment of dismissal is reversed and the action remanded to the superior court, with directions to overrule the demurrer to the storage company's reply to the produce company's second and third affirmative

defenses, and for such further proceedings as shall not be inconsistent with the views herein expressed.

MAIN, C. J., FULLERTON, TOLMAN, and MITCHELL, JJ., concur.

[No. 14733. Department Two. August 14, 1918.]

CHARLES DAVIDSON *et al., Appellants*, v. NOAH B. KING *et al., Respondents.*[1]

APPEAL—RECORD—AFFIDAVITS. Affidavits on motion for a new trial cannot be considered when not made a part of the statement of facts.

SAME—RECORD—STATEMENT OF FACTS. A statement of facts, certified to be incomplete, and which is not indexed as required by Rule III, will be struck out on motion.

Appeal from a judgment of the superior court for Lewis county, Back, J., entered August 13, 1917, upon findings in favor of the defendants, in an action for an injunction. Affirmed.

Gus L. Thacker, for appellants.

O. J. Albers and *Herman Allen*, for respondents.

HOLCOMB, J.—This action was instituted by appellants to enjoin respondents from selling property under a writ of attachment. A temporary injunction issued, and respondents answered, claiming that the writ of attachment, having been filed prior to the deed in point of time, was prior and superior to the deed. On these issues the case was tried before Judge Rice, who took the matter under advisement and mailed a memorandum decision January 1, 1917. On January 4, 1917, respondents served and filed a motion for new trial and a motion for judgment in their favor. While the mo-

[1]Reported in 174 Pac. 434.

tions were pending, without notice to respondents, counsel for appellants had a judgment entered January 5, 1917. Judge Rice's term of office expired January 7, 1917, and Judge Reynolds, his successor, being disqualified, the cause was transferred to Judge Back, who granted a new trial after a hearing upon affidavits and a transcript of the evidence. Subsequently, the cause came on for trial before Judge Back, and resulted in a judgment in favor of respondents.

Respondents ask this court to strike from the transcript on appeal two affidavits used in the motion for new trial, for the reason that they should have been made a part of the statement of facts or brought up by a bill of exceptions. This motion must be granted under our former rulings. *State v. Moran,* 66 Wash. 588, 120 Pac. 86; *Gazzam v. Zimmer,* 68 Wash. 41, 122 Pac. 366; *Stern v. Spokane,* 73 Wash. 118, 131 Pac. 476, 46 L. R. A. (N. S.) 620; *Norton v. Pacific Power & Light Co.,* 79 Wash. 625, 140 Pac. 905.

Respondents also move this court to strike the statement of facts for the reason that it is incomplete in that it does not contain the affidavits and transcript of the evidence of the first trial, used by the court in determining the motions for new trial and judgment in favor of defendants; that the statement of facts is not properly certified, nor certified within the time fixed by statute. The statement of facts was served and filed August 28, 1917, in the superior court of Lewis county, Washington. The latter portion of the trial judge's certificate states:

"I further certify that the statement of facts does not include a full record of the facts, matters and proceedings presented to the court with reference to the vacation of the judgment signed by Judge Rice and upon the motion for new trial by the defendants, which motions were made by the defendants herein.

"Respondent excepts to the court certifying the foregoing statement of facts for the reason that amendments to the same having been proposed by the defendants no application to have the same certified was made until March 22, 1918, and that said statement of facts was not certified by the court reporter until after the time within which the clerk of court is to forward the transcript and proceeding to the supreme court and exception allowed."

There is nothing before us to show that amendments were proposed by defendants within the time limited by statute. The statement of facts is certified to be incomplete. The statement of facts is subject to the further objection upon the part of the court that it is not indexed as required by Rule III, Supreme Court Rules.

For these reasons the statement must be stricken, and the case having been appealed to be heard *de novo* upon the record, the record being gone, there is nothing that we can consider upon appeal. The judgment must therefore be affirmed.

Affirmed.

MAIN, C. J., CHADWICK, MOUNT, and MACKINTOSH, JJ., concur.

[No. 14738. Department One. August 14, 1918.]

DONWORTH & TODD, *Appellants*, v. BENTON COUNTY, *Respondent*.[1]

APPEAL—DECISIONS APPEALABLE—FINAL ORDER OF COURT. A judgment awarding attorney's fees, upon an order of the court in the matter of the approval of a claim allowed by county commissioners, after a hearing before the court on the merits, is appealable as a final order of the court.

ATTORNEY AND CLIENT—COMPENSATION — EVIDENCE — SUFFICIENCY. Under a contract for reasonable compensation, attorneys are entitled to a fee of $3,000 for successfully representing a county in a suit to set aside invalid bonds in the sum of $125,000, requiring the exercise of legal skill and ability of a high order, three attorneys having testified that $2,500 to $3,500 would be a reasonable charge.

Appeal from a judgment of the superior court for Benton county, Truax, J., entered November 28, 1917, disapproving, in part, a claim for attorney's fees, allowed by county commissioners, after a hearing on the merits before the court. Reversed.

R. E. Campbell, for appellants.

PARKER, J.—Donworth & Todd are duly admitted to practice law in the courts of this state, and are engaged in the practice of their profession in Seattle as copartners. They seek recovery from Benton county of a balance of $2,000, claimed to be due for legal services rendered by them to that county in pursuance of a contract with its board of county commissioners. A hearing upon the merits in the superior court for that county resulted in a judgment awarding them only $500; from which they have appealed to this court, claiming error in so far as they are denied recovery for the full amount of their claim of $2,000.

[1]Reported in 174 Pac. 441.

In January, 1917, appellants duly entered into a written contract with the county, acting by its board of commissioners, which, so far as we need here notice its terms, reads:

"The said county of Benton hereby employs the said firm of Donworth & Todd as special attorneys to appear for the said county of Benton and its board of county commissioners with C. W. Fristoe, prosecuting attorney of said Benton county, in the cases of H. A. Bier, Plaintiff, vs. James B. Clements et al, defendants, now on appeal from the judgment of the superior court of Benton county, Washington, to the supreme court of the state of Washington, and H. A. Bier vs. J. C. Syfford, auditor of Benton county, Washington, et al., now pending in the superior court of Benton county, Washington, and to advise with and counsel the said county of Benton and its board of county commissioners relative to said litigation, and all matters pertaining thereto, and agree to pay said attorneys for such services a retainer of five hundred dollars ($500) in each of said cases, and such reasonable compensation in addition thereto as may be fixed by the judge of the superior court of Benton county, Washington, during such litigation, or at the termination thereof; and in consideration of such employment said attorneys agree to appear in said actions for the county of Benton and its board of county commissioners, with the prosecuting attorney of said county, and to advise with and counsel said county and its board of county commissioners relative to all matters pertaining thereto."

This contract was duly approved by the judge of the superior court for that county as provided by Rem. Code, § 3908. Appellants received from the county the agreed retainers aggregating $1,000, and entered upon the services contemplated by the terms of the contract. After the completion of their services, which proved successful in protecting the county's interest in every respect as undertaken by them, they presented in due

form to respondent's board of county commissioners their claim of $2,000, as the balance due for their services. The board thereupon adopted a resolution, which, omitting recitals referring to the litigation and appellants' employment contract, reads as follows:

"Whereas, said litigation has been ended with success to the interests of Benton county, and said attorneys have performed all services to the satisfaction of the board of county commissioners, and have advised said board of county commissioners at all times relative to said litigation and all matters relative thereto, and

"Whereas, said attorneys have presented their bill to the county commissioners for additional compensation amounting to the sum of two thousand dollars ($2,000).

"Be It Resolved, that said bill of said attorneys be and the same is hereby approved and that upon the judge of the superior court of Benton county, Washington, having also approved said bill, the auditor of said county be and he is hereby directed to issue to said attorneys his warrant in the sum of two thousand dollars ($2,000) in payment for said compensation."

Thereafter, the question of the approval of appellants' claim came duly on for hearing in the superior court for Benton county, appellants and the county being both represented by counsel, and manifestly consenting that the matter be finally disposed of upon the merits by the court. We use the word "court" advisedly, for the disposition of the matter upon the merits was by a formal order of the court as such, and not merely by the judge as an agreed arbiter. We make this observation to show that the order is in effect a final judgment and appealable as such.

The services rendered by appellants under their contract had to do with litigation and affairs of the county highly important to its taxpayers; and, financially, of large magnitude. The object of the litigation was the setting aside of a proceeding of a former board

of county commissioners, which had been taken looking to the bonding of the county for $125,000, and the building of a courthouse at a cost of over $100,000, which had proceeded to the stage where the bonds were practically ready for issuance, and the contract for the construction of the courthouse had been let, both with apparent legality; but illegal, as was claimed, because tainted by at least legal fraud. Appellants' duties under their contract called for the exercise of legal skill and ability of a high order, and also for as much or even more industry than vigorously contested cases of that nature usually call for. The litigation was in both the superior court and this court. Appellants were not only successful in having the bond issue and courthouse contract set aside, but also effected a considerable saving to the county in connection with claims incidentally involved in the controversy. At the hearing in the superior court, besides the testimony of one of appellants that their claim was reasonable in amount, three disinterested practicing attorneys testified, after having been made fairly well acquainted with the nature and extent of the services rendered, one that $3,000 would not be an unreasonable charge; one that $2,500 to $3,000 would be a reasonable charge; and one that $3,500 would be a reasonable charge. This is all the testimony as to the reasonableness of the amount of appellants' claim. It seems to us, in view of this testimony and the fact that the board of county commissioners admitted the reasonableness of appellants' claim by their resolution allowing it in the sum of $2,000, that appellants are entitled to a judgment against the county in that sum. Our decision in *Jones v. Jones*, 72 Wash. 517, 130 Pac. 1125, lends support to this conclusion.

The judgment is reversed in so far as it is in effect

a denial to appellants of recovery of the full amount of their claim; and the cause is remanded to the superior court with directions to enter a judgment in favor of appellants and against the county for the sum of $2,000, in lieu of the one heretofore rendered.

MAIN, C. J., MITCHELL, and TOLMAN, JJ., concur.

[No. 14770. Department Two. August 14, 1918.]

JOHN MOORE *et al.*, *Appellants*, v. F. S. RODDIE, *Respondent*.[1]

MASTER AND SERVANT—RELATION—INJURY TO THIRD PERSON—QUESTION FOR JURY. Where a driver of an automobile is employed to hold himself ready to drive at all hours, the fact that he took a car to go to his supper and to return to the garage, cannot relieve him of employment as agent of the owner; the question being one for the jury, under Rem. Code, § 5562-33, relating to the liability of owners, and under the *prima facie* case made by ownership and the presumption of agency if the owner intrusts a dangerous instrumentality to another or leaves it so that another may use it.

MUNICIPAL CORPORATIONS—USE OF STREETS — AUTOMOBILES — CONTRIBUTORY NEGLIGENCE. The contributory negligence of a pedestrian, struck by an automobile driven at excessive speed, is a question for the jury, where there was evidence that she looked both ways before starting to cross the street and saw no car, and she may or may not have been at a crossing where a city ordinance gave pedestrians the right of way.

TRIAL—QUESTION OF FACT. The weight and credibility of the testimony of interested witnesses upon disputed contradictory facts is for the jury where reasonable minds might differ.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 23, 1917, upon an order granting a motion for judgment notwithstanding verdict, in an action for personal injuries. Reversed.

[1]Reported in 174 Pac. 648.

Walter S. Fulton, for appellants.

Roberts, Wilson & Skeel and *Farrell, Kane & Stratton,* for respondent.

HOLCOMB, J.—In this action appellants recovered damages for personal injuries caused by respondent's automobile. Respondent owned two automobiles, a touring car and a Metz roadster, used principally for business. One Wakelin was employed to drive both cars when occasion arose, both day and evening. The cars were kept at a garage some distance from the home. On the evening of the accident respondent had the touring car at home. It is claimed by respondent that the driver, without his knowledge and consent, took the Metz car from the garage to go to his own home for his supper, and that this he had permission to do when required to return for further duty for his master, but not otherwise; and that on this occasion he had been notified at about six o'clock he would not be needed further that evening. While he was returning to the garage east on Pike street and at the intersection of Terry avenue, Seattle, he collided with Mrs. Moore who was walking across Pike street from the northwest corner of Pike and Terry to Hubbell Place. The testimony shows that the machine was run at an excessive rate of speed, without sounding of the horn or giving any warning of its approach. Respondent pleaded contributory negligence, in that Mrs. Moore was not at a street crossing. At the close of the evidence the respondent challenged the sufficiency of the evidence. The cause was submitted to a jury, which returned a verdict of $5,500 in favor of appellants. The court denied a motion for new trial, but granted judgment for respondent *non obstante veredicto,* which appellants assign as error.

The chief question is, whether the owner of an automobile is responsible for the negligence of a driver of a machine when operating the same for the owner or as his agent. The driver was employed to hold himself ready at all times to drive one of the cars. The mere fact that he used the Metz car to go to his supper and to return to the garage cannot relieve him of the employment as an agent of the owner. Under the evidence it was a question for the jury.

Rem. Code, § 5562-33, provides:

"Nothing in this act shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages by reason of injury to person or property resulting from the negligent use of the public highways by the driver or operator of any motor vehicle or its owner or his employee or agent, and the owner of such vehicle shall be equally liable for the negligent operation thereof, when at the time of such injury the vehicle was operated by the agent of such owner, or by any person employed by him for the purpose of operating such vehicle."

An automobile is a dangerous instrumentality, and, if the owner entrusts it to another or leaves it so that another may use it, that other must be presumed to be the agent of the owner. In *Knust v. Bullock,* 59 Wash. 141, 109 Pac. 329, it is said:

". . . where it is shown that the wagon and team doing damage belonged to the defendants at the time of the injury, that fact establishes *prima facie* that the wagon and team were in possession of the owner, *and that whoever was driving it was doing so for the owner.*"

Ownership of the automobile having been admitted, it is plain that the plaintiffs made a *prima facie* case for the jury and, unless overcome by defendant's testimony, are entitled to recover. The testimony shows that Mrs. Moore looked both ways before starting to

cross the street, but did not look after that as she thought the way was clear. The testimony is somewhat contradictory as to whether she was at a street crossing or below the same. There is varying testimony that she was carried from thirty to forty feet after being hit by the car, and some witnesses testified that she was carried about eighty feet. There was introduced a city ordinance which gives the pedestrian the right of way upon crossings, while automobiles have the right of way between crossings. As to all this contradictory evidence, it was a question for the jury whether plaintiff's acts were free from contributory negligence. Whether the driver was acting for the owner or his own personal benefit was not conclusively established, but was a disputed question of fact for the jury. The owner's daughter testified that she telephoned the driver at 6:15 p. m., while he was at the garage, that he was not needed any more for the evening. The owner of the car and the driver testified to the same effect. Phillips' evidence was introduced to impeach the driver's testimony. The fact that the driver had no regular hours of employment, but might be called at any time both day and evening under a steady employment, is a circumstance to consider. The weight and credibility of the testimony of interested witnesses is also for the jury, who may disregard the same. The jury were not bound to believe the testimony in this respect. *Kneff v. Sanford,* 63 Wash. 503, 115 Pac. 1040; *Purdy v. Sherman,* 74 Wash. 309, 133 Pac. 440.

This case is readily distinguishable from that of *Babbitt v. Seattle School Dist. No. 1,* 100 Wash. 392, 170 Pac. 1020, where there were no disputed facts for the jury to decide; in this case, as is seen, the contradicted facts are numerous. It is not our duty to trench upon the province of the jury when there are disputed

contradictory facts concerning which reasonable minds might differ.

The trial court erred in entering judgment *non obstante veredicto*, and the judgment is reversed and the cause remanded with instructions to enter judgment on the verdict.

CHADWICK and TOLMAN, JJ., concur.

[No. 14714. Department One. August 19, 1918.]

INA HOFFMAN SNOOK, *Appellant*, v. H. B. KENNEDY, *et al., Respondents.*[1]

EXECUTORS AND ADMINISTRATORS — ACTIONS — ATTORNEY'S FEES. Where the executrix of a nonintervention will brought action for an accounting, making her attorney a party defendant, who was alleged to have an undetermined claim against the estate, she cannot assign error in that the judgment fixed the amount of his fees.

APPEAL—REVIEW—ASSIGNMENT OF ERRORS. Complaint cannot be made that a judgment entered should not have been against an executrix or against the estate in the absence of any assignment of errors thereon.

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—ATTORNEY'S FEES—EVIDENCE. Six thousand dollars is reasonable compensation for an attorney for an executrix of a nonintervention will, where the estate was appraised at over $400,000, there were over 400 pieces of real estate involved, he probated the will and attended to all the usual duties, and there were diversified interests involving a great deal of detail, and all services were diligently attended to with reasonable success.

Appeal from a judgment of the superior court for King county, Jurey, J., entered August 1, 1917, in favor of defendants, in an action by an executrix to fix the compensation of an attorney, tried to the court. Affirmed.

[1]Reported in 174 Pac. 643.

Tucker & Hyland and *Herbert E. Snook,* for appellant.

Donworth & Todd, for respondent.

TOLMAN, J.—The appellant, who is the executrix under a nonintervention will, brought this action seeking an accounting and possession of the property belonging to the estate from the defendants and respondents. The respondent Carl J. Smith had been her attorney in the matter from its inception, and the only part of her complaint which affects him is paragraph XX, which reads:

"That the defendant Carl J. Smith heretofore has been the attorney for the plaintiff herein, and is entitled to an undetermined claim as against said estate of Josephine E. Kennedy, deceased, for services as counsel in said estate, which remains unfixed and undetermined."

So far, therefore, as Carl J. Smith is concerned, the only purpose of the action was to fix the amount due him for professional services rendered to the estate. After hearing upon this issue, and before the entry of the final judgment upon the other issues, the trial court entered a judgment in favor of the respondent Smith and against Ina Hoffman Snook, as executrix, and against the estate, for $6,000, with costs and interest, and impressed the judgment as a trust upon all of the property of the estate. The appeal is taken from this judgment, and errors are assigned as follows:

"(1) The court erred in rendering judgment for respondent Carl J. Smith.

"(2) The amount allowed to Carl J. Smith was too large."

The court having theretofore found the estate to be solvent, and entered the usual nonintervention order,

the action was a proper one for the purpose of fixing the amount due the respondent Smith; because, the parties failing to agree, there was no way in which the amount of the attorney's fees could be fixed except by an action brought by one or the other of the interested parties; and the appellant having sought the aid of the court for this purpose, cannot complain because of the entry of a judgment.

It is argued here that the judgment should not have been entered against the appellant as executrix or against the estate. But no error is assigned thereon, and we cannot review the action of the trial court in that respect.

As to the amount allowed, it appears that the estate was appraised at upwards of $411,000; that the respondent Smith had probated the will, attended to the inventory and appraisement, and all of the usual duties connected with such proceeding; that there were over four hundred separate pieces of real estate involved, several hundred delinquent tax certificates issued from various counties in this state, involving upwards of $85,000, and many other diversified interests, all of which had to be carefully looked after, and involved a great deal of detail. A vast amount of time and effort was expended in conferences and negotiations with the surviving husband of the decedent, the overlooking and checking of the business carried on by him, the procuring of monthly reports, and the division of moneys realized, and also looking toward the division of the estate, which consisted of community property, without litigation, all of which services appear to have been diligently rendered and with reasonable success up to the time this action was brought, when the services ceased. In the light of the evidence, which we have carefully examined, we see no reason for disturbing the allowance made by the trial court,

which seems to us to be reasonable, modest, and amply supported by the evidence.

The judgment will therefore be affirmed.

MAIN, C. J., FULLERTON, MITCHELL, and PARKER, JJ., concur.

[No. 14727. Department One. August 19, 1918.]

J. E. WROTEN *et al.*, *Respondents*, v. C. H. ROBBINS, *Appellant.*[1]

RECEIVERS—APPOINTMENT—PARTIES ENTITLED. Copartners of a failing firm, who were vendees in a conditional sale of a logging outfit, wrongfully excluded from the possession of partnership property by the vendor, without notice, are entitled to maintain an action for the appointment of a receiver to conserve the property and wind up the partnership business.

RECEIVERS—COMPENSATION—ATTORNEY'S FEES. An allowance to a receiver of a logging concern of the usual pay which he could earn as a competent logging foreman, and $50 to his attorney, appear to be modest.

MECHANICS' LIENS—CLAIMS—WAIVER. A clause in a contract for the rental of a donkey engine providing for payment at the time each raft of logs is sold, and if not so paid, giving the lessor the right to declare the agreement at an end, is not a waiver of the right to file a lien for unpaid rental.

Appeal from a judgment of the superior court for Mason county, Wright, J., entered January 9, 1918, in favor of the plaintiffs, in an action for a receiver of a partnership, tried to the court. Affirmed.

Andrew J. Balliet and *C. H. Steffen*, for appellant.

R. A. Lathrop and *Troy & Sturdevant*, for respondents.

TOLMAN, J.—The respondents and the defendant Barron were, at and before the time of the bringing of

[1]Reported in 174 Pac. 968.

this action, copartners doing business as Mill Creek Logging Company. On October 3, 1916, the copartnership as it was then constituted, purchased from the appellant Robbins a logging outfit, camp outfit, and equipment, and entered into a written agreement of conditional sale with respect thereto, by which the appellant reserved title to the property in himself, which contract does not appear to have been filed for record. The contract provides that the partnership is to be paid for handling and booming certain timber theretofore cut by the appellant, and is to cut certain timber belonging to the appellant, on which he shall be paid a stumpage, and the proceeds of the timber so cut and marketed are to be paid, either to a bank or to appellant, and after payment of wages and operating expenses therefrom, the purchase price of the outfit, $2,500, is to be paid out of such proceeds at the rate of $200 per month; and the partnership agrees to market at least one boom of logs every ninety days, of sufficient size to cover all payments which may become due in any such ninety-day period. The contract further provides:

"It is mutually agreed by and between all the parties hereto, that if the parties of the second part cannot make good in ninety days or perform this agreement during any ninety-day period hereunder, then they hereby agree to relinquish all claim to everything contracted for hereby to the party of the first part, together with all logs, poles, piling and boom-sticks, cut or uncut, on the above described premises and in the water."

The partnership not having marketed sufficient logs to comply with the terms of the agreement, on December 29, 1916, an extension agreement was entered into by which the time for payment was extended for an additional period of ninety days from January 15, 1917, and appellant agreed to furnish all groceries

necessary to be used in carrying on operations during such extended period. No timber was sold and no money paid during such extended period, and so far as appears, no demand was made or default claimed prior to the taking possession of the outfit by the appellant as hereinafter set forth.

On or about May 17, 1917, intervener De Hart, asserting a claim for the rental due him for a donkey engine which he had leased to the partnership about December 1, 1916, filed a lien therefor, and demanded his money, threatening to foreclose his lien if he were not paid. The partnership not being able to pay De Hart, and having a possible opportunity to sell out, respondents leaving the defendant Barron in charge came to Olympia, and with De Hart went to the appellant's place of business on May 19, 1917. The evidence is conflicting as to just what took place at that time, but it appears that the respondents and De Hart both demanded of the appellant that he pay or secure De Hart so that the lien might be released and the operations proceed or the sale be consummated; and respondents also asked for a statement of the amount due from the partnership to the appellant. The appellant refused to pay or secure De Hart, and seems to have promised a statement of his account within a day or two, which was never furnished. There is some testimony that the respondents refused to return to their work unless De Hart's claim was taken care of, all of which is denied by them.

While the respondents were waiting for the statement of account, the appellant, as he claims, because of their refusal to return to camp and go on with the work, but at any rate without any previous demand and without notice to respondents, took possession of the camp and of all the property covered by the contract, excluding respondents therefrom, and claiming

that they had abandoned their contract and that their rights were forfeited; whereupon this action was commenced seeking the appointment of a temporary receiver, praying that a hearing be had, and that a permanent receiver be appointed to take charge of all of the property described in the contract and of the timber produced by the partnership under the contract, and dispose of the same and of the proceeds as the court might direct in winding up the partnership business. A temporary receiver was appointed, and after a hearing the receiver was continued pending the litigation.

The lien claimants intervened in the cause. The receiver, under order of court disposed of the timber cut by the partnership, from which he realized $2,286.92. On July 16, 1917, the trial court entered a decree allowing the receiver $175 as his fees to that date, directing the payment of the receiver's expenses, allowing the intervener De Hart $352.92 in full of his lien and costs, allowing the intervener Mrs. J. E. Wroten $171.75 in full of her lien claim and costs, directing the payment to appellant of $491.45 in full for stumpage, and the payment of the other preferred claims for labor, allowing the appellant's claim for groceries furnished, as a general claim, and allowing other general claims. The decree directed that the proceeds from the timber realized by the receiver be first exhausted in paying these allowances and, if there should be a deficiency, such deficiency should be paid out of the property described in the conditional sale agreement; and the court retained jurisdiction for the purpose of disposing of said property if necessary. Thereafter the court made an additional allowance to the receiver of $233.10, being at the regular rate of pay for a logging foreman, allowed $50 to the attorneys for the receiver as their fees, and allowed the

intervener De Hart's claim for certain cables which had been leased with the donkey engine, together with the cost of delivery of the same to him.

The appellants have appealed from this decree, and by assignments of error question the appointment of the receiver, the compensation allowed to him and to his attorneys, and the allowance of the claims of the intervener, including De Hart's claim for the cables.

We have carefully examined the record, and find that about the only material conflict in the testimony on the main issue is upon the question of the abandonment of the enterprise by the respondents, and are satisfied that the abandonment is not established and, therefore, the attempt of the appellant to take possession without notice cannot be considered as altering the rights of the parties. That being so, the respondents were sufficiently interested in the subject-matter to justify the appointment of a receiver, to say nothing of the rights of creditors, which alone might be sufficient.

The allowance to the receiver and his attorneys appears to be modest, the receiver being a competent logging foreman, and receiving only what amounted to the usual pay of such a foreman. These are matters with which the trial court, by reason of his knowledge of the extent and nature of the services, was peculiarly qualified to deal, and we find nothing in the record which warrants us in disturbing his judgment thereon.

The lien claim of De Hart was based upon a written agreement which provided that the rental of $125 per month should be paid "at the time each raft of logs upon which said donkey engine is to be worked is sold, and if not so paid said Leo De Hart can declare this agreement at an end." The agreement also contained an option to purchase, but that does not appear to be

material here. It is argued that the quoted clause from the rental contract brings the intervener's case within the rule laid down by this court in *Anderson v. Tingley,* 24 Wash. 537, 64 Pac. 747, 85 Am. St. 959. In that case the lienor agreed that he should not receive his pay "until the defendant had sold said logs and received the proceeds thereof from such mill." Manifestly it was not the selling of the logs which there defeated the claimant's right to a lien, but the agreement that the employer should receive the money therefor, thus putting the purchaser in a position where he could not protect himself from such a lien except by paying for the logs a second time.

A case more nearly in point is that of *Maris v. Clevenger,* 29 Wash. 395, 69 Pac. 1089, though the contract in that case went further than this, and provided that when the logs were sold the sum due the lienor should be left with the purchaser for him. Nothing said in either case is inconsistent with the general rule laid down in 27 Cyc. 263, which is cited by this court with approval in *Gray v. Hickey,* 94 Wash. 370, 162 Pac. 564, and which is as follows:

"Any agreement or stipulation which clearly shows that it is the intention of the parties that the right to a lien shall be waived is sufficient to accomplish the purpose; but the contract must receive a reasonable construction, and in the absence of language indicating a purpose under no circumstances to claim a lien it is not to be supposed that the contractor intended to absolutely relinquish his right, and where the terms of the contract are ambiguous the doubt should be resolved against the waiver. Agreements with respect to the manner of payment will not effect a waiver of the lien unless the terms agreed on are inconsistent with the existence or enforcement of the lien."

We conclude, therefore, that the court did not err in the allowance of the De Hart claim.

As to the cables which were awarded to De Hart, the court found that they belonged to him, and the evidence does not preponderate against that finding.

A portion of the claim of the intervener Mrs. J. E. Wroten is objected to upon the ground that, about January 1, 1917, the appellant furnished money to pay wages, and all the wages he then supposed were due, and that Mrs. Wroten's claim for the time she had worked between November 24th and January 1st following was not disclosed or presented to him. The claim seems to be fairly established by the evidence, there are no elements of estoppel present, and we think the claim was properly allowed.

Finding no reversible error, the judgment is affirmed.

MAIN, C. J., PARKER, FULLERTON, and HOLCOMB, JJ., concur.

[No. 14748. Department One. August 19, 1918.]

NORRIS-SHORT COMPANY, *Appellant*, v. EVERSON MERCANTILE COMPANY, *Respondent*.[1]

TRIAL—MOTION FOR JUDGMENT—NEW TRIAL. Motions for judgment notwithstanding a verdict or for a new trial should not be granted where reasonable minds might reach different conclusions upon the evidence.

APPEAL—REVIEW—RECORD. In the absence of the affidavits or other evidence used, the denial of a new trial for newly discovered evidence cannot be reviewed on appeal.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered June 12, 1917, upon the verdict of a jury rendered in favor of the defendant, in an action upon contract, after a trial on the merits. Affirmed.

[1]Reported in 174 Pac. 645.

Will J. Griswold, for appellant.
Sather & Livesey, for respondent.

PARKER, J.—The plaintiff Norris-Short Company seeks recovery of damage which it claims as the result of the failure of the defendant Everson Mercantile Company to deliver to it fifteen tons of potatoes in pursuance of a sale contract therefor, entered into between them. Trial in the superior court for Whatcom county, sitting with a jury, resulted in verdict and judgment in favor of the defendant, from which the plaintiff has appealed to this court.

Appellant rests its claim upon the contract as being wholly in writing, and the failure of respondent to deliver the potatoes within the time specified in the writing, which it claims is a duplicate of the contract, at the time of entering into it. Respondent rests its defense upon the theory that no time of delivery was specified in the written portion of the contract, and that as to the time of delivery the contract was oral. The contract in so far as it was in writing was on a blank printed form and evidently intended to be signed in duplicate, so that each party would have a duplicate. The one retained by appellant now has in the blank space for specifying time of delivery, the words "during January," while that space is left blank in the one retained by respondent. It is claimed by respondent that these words were written in appellant's duplicate after the making of the contract. The potatoes were not delivered in January, but delivery thereof was tendered by respondent later. The time of delivery was not agreed upon specifically in the oral portion of the contract as claimed by respondent to have been made. It became a question of reasonable time for delivery, under the oral portion of the contract as claimed by respondent.

It is first contended in appellant's behalf that the trial court erred in denying its motions for judgment notwithstanding the verdict, and, in the alternative, for a new trial, upon the ground that the evidence calls for the granting of one or the other thereof. A review of the evidence convinces us that it was ample to support the verdict and judgment. The questions of whether or not the written contract specified the time for delivery of the potatoes, and whether or not delivery of the potatoes was tendered within a reasonable time, if there was no specified time in the written contract for their delivery, were, under the evidence, plainly such that reasonable minds might reach different conclusions upon. We conclude that there was no error committed in the denial of these motions in so far as this ground is concerned.

Appellant's motion for a new trial was also made upon the ground of newly discovered evidence. The denial by the court to grant the motion upon this ground is also claimed as erroneous. There are no affidavits or other evidence embodied in the statement of facts touching this ground of the motion. We therefore cannot know what affidavits or other evidence was before the trial court upon which its decision upon this ground of the motion was rested, so we are unable to say that the court's decision thereon was erroneous. *Kuykendall v. Lambie*, 99 Wash. 366, 169 Pac. 853.

The judgment is affirmed.

MAIN, C. J., MITCHELL, TOLMAN, and FULLERTON, JJ., concur.

[No. 14858. *En Banc.* August 27, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Thomas Keyes, Plaintiff,* v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *W. A. Huneke, Judge, Respondent.*[1]

VENUE—RESIDENCE OF DEFENDANT—RIGHT TO CHANGE—CODEFENDANTS. Where a change of venue to the county of the defendant's residence, upon a showing that codefendants were joined merely for the purpose of retaining venue, was denied with leave to renew the motion if at the trial no relief is claimed against the other defendants, defendant is entitled to the change of venue, after appeal and remand, where the codefendants had absconded or were insolvent and had been eliminated by the judgment without the trial of any real issue, leaving the real controversy to be tried out against him as sole defendant.

Application filed in the supreme court May 17, 1918, for a writ of prohibition to the superior court for Spokane county, Huneke, J., to prohibit the court from retaining jurisdiction, and to compel the granting of a motion for a change of venue to the county of the relator's residence. Writ granted.

McCroskey & Stotler and *Voorhees & Canfield,* for relator.

Danson, Williams & Danson (George D. Lantz, of counsel), for respondent.

MACKINTOSH, J.—The relator has petitioned to prohibit the superior court for Spokane county from proceeding to the trial of a case in which he is the defendant and the Washington Trust Company is plaintiff. The history of this action may be summarized as follows: The relator is a resident of Whitman county, Washington, and is the maker of a promissory note

[1]Reported in 174 Pac. 646.

which is indorsed by the McCarthy Auto Company and L. D. McCarthy. In September, 1913, the Washington Trust Company began an action in the superior court for Spokane county upon this note, against the relator and the McCarthy Auto Company and L. D. McCarthy. At the time of the commencement of the action, McCarthy, who had previously been a resident of Spokane county, had absconded from the state of Washington, and was absent therefrom, and the McCarthy Auto Company, which had its principal place of business in Spokane county, was insolvent and in the hands of a receiver. After the summons and complaint had been served upon the relator at his residence in Whitman county, he appeared in the action, demurred to the complaint and, at the same time, filed an affidavit of merits and demanded that the trial be transferred to the county of his residence, alleging in his affidavit for change of venue that the McCarthy Auto Company and McCarthy were in collusion with the plaintiff and were joined as defendants for the sole purpose of attempting to retain the venue of the action in Spokane county; that McCarthy and the auto company were insolvent, and that no judgment, if obtained against them, could be collected; further alleging that suit had already been waged by the Washington Trust Company against the relator and McCarthy company and McCarthy upon a note, which was one of the same series as the one in controversy here, and that in that prior action McCarthy and the auto company had acted in collusion with the Trust company, and that in the prior action no judgment was sought against McCarthy or the company, and that the attorneys for the Washington Trust Company were the attorneys for the receiver of the McCarthy company. This motion for a change of venue was denied, the court, however, including in the order "if no relief is claimed

against the other defendants at the time of trial, then leave will be granted to renew the motion." Subsequently the McCarthy Auto Company and L. D. McCarthy jointly answered the complaint, denying the material allegations thereof in this manner, "deny that they have any information sufficient to believe." The relator answered the complaint, setting forth various matters, which raised the only issue in controversy in the action. After the issues had been joined between the Washington Trust Company and the relator, and after the McCarthy answer had been served and prior to the trial, the relator renewed his motion for change of venue upon the ground that there was no controversy between the Washington Trust Company and McCarthy and the McCarthy Auto Company, but that they were joined in the action merely for the purpose of retaining the venue in Spokane county, and that their answer was sham and frivolous, and that the Washington Trust Company was entitled to judgment against them upon their answer. This motion was also denied, but the right was reserved to the relator to renew it, "if no relief is claimed against the other defendants at the time of trial." The action proceeded to trial and resulted in the jury returning a verdict in favor of the Washington Trust Company and against the McCarthy Auto Company and L. D. McCarthy, but in favor of relator. No evidence was introduced upon the trial in behalf of either McCarthy or the company. Upon a motion for judgment notwithstanding the verdict, judgment was entered in favor of the Washington Trust Company against the relator, from which he appealed to this court, and the action of the lower court was reversed. Upon the return of the remittitur to the superior court for Spokane county, a motion for a new trial was granted as to the relator.

No effort has been made to collect the judgment against McCarthy and the auto company, and no execution has been issued thereon. The relator renewed his motion for a change of venue on the ground that, as the action now stands, he is the only defendant in the case and, being a resident of Whitman county, is entitled to have the trial held in that county. The trial court having denied that motion, he comes here for this writ.

The judgment of the Washington Trust Company against McCarthy and the McCarthy Auto Company never having been appealed from or reversed is in full force and effect, and no issue exists as to them in the case of the Washington Trust Co. v. Keyes, and neither of them are now interested in any issue involved in the case. Under the orders denying the two motions made for a change of venue, which provided that "if no relief is claimed against the other defendants at the time of trial, then leave be granted to renew said motion," the relator is entitled to a renewal of the motion at this time for the reason that the trial which took place having set aside the leave granted to renew the motions applies to the trial about to take place, in which no relief is claimed against the other defendants. The action now stands as it would have originally had there been no defendant other than the relator, for it is apparent that McCarthy and his company were never seriously considered as defendants in the action. Their financial condition, the fact that McCarthy himself was an absconding debtor, that a sham and frivolous answer was interposed, and that no effort has ever been made to collect the judgment and that there is no denial that the judgment never was collectible, all indicate that they were merely included as defendants for the purpose of anchoring the action in Spokane county. And, now that they have been elim-

inated, the real controversy in the suit should be tried out where the real defendant, under the statute, is entitled to have it tried. We have decided in *State ex rel. Cummings v. Superior Court,* 5 Wash. 518, 32 Pac. 457, 771, and in *State ex rel. Martin v. Superior Court,* 97 Wash. 358, 166 Pac. 630, L. R. A. 1917F 905, that:

"While it may in general terms be referred to as a privilege, the claim for a change of venue, when once asserted, no question of fact being involved and no discretion of the court invoked, is more than a privilege; it is a right. It has been so held whenever and wherever this court has been called to pass upon the question."

In *State ex rel. Stewart & Holmes Drug Co. v. Superior Court,* 67 Wash. 321, 121 Pac. 460, there existed a situation somewhat similar to the one here presented. In that case the Stewart & Holmes Drug Company began an action in King county against one Ross, and at the same time began a garnishment proceeding against one Reed, whose residence was in San Juan county. No service was obtained upon Ross, and Reed appeared and made a motion for a change of venue to San Juan county, the place of his residence; the trial court, granting the motion conditioned upon the nonappearance of the principal defendant Ross, entered this order:

"The clerk of this court hold the papers in King county until the expiration of the time for appearance of the defendant Ross. If the defendant Ross appears and defends the action, the motion for a change of venue is denied. If the defendant Ross does not appear and is defaulted, then the motion for a change of venue is granted, and the clerk of the court is authorized to send all papers to the clerk of the superior court of San Juan county for trial."

This court in the opinion said:

"The residence of the defendant being in San Juan county, and it having transpired that the principal

action will not be tried upon its merits in King county, we find no reason for interfering with the order of the court, whether it be grounded upon the absolute right of a defendant . . . or upon the discretionary power of the court."

So here, it appearing that no issue was in good faith triable between the Washington Trust Company and the McCarthy company and McCarthy, and that as a matter of fact no issue was actually tried between them, the relator is entitled as a matter of right, after the elimination of the McCarthy company and McCarthy, to have the real issue in the case transferred for trial to his home county. The Washington Trust Company insists that the status at the commencement of the action, and not after the rendering of judgment against the defendants resident in Spokane county, is the status which determines the right to a change of venue, and relies upon *Rector v. Thompson,* 26 Wash. 400, 67 Pac. 86, to the following effect:

"It is insisted that the court erred in refusing to change the place of trial upon defendants' motion. The defendants Kneeland & Spofford and Stock, at the time the action was commenced and at the time of the trial, were residents of Pierce county. Defendant Thompson was a resident of Thurston county. Defendant Colvin was the only resident of Lewis county. The action was brought in Lewis county. Before answer, and by special appearance, defendants moved the court for a change of venue, which motion, on account of irregularities therein, was not considered upon its merits, and was denied for that reason. At the close of plaintiff's case the defendant Colvin, on his motion therefor, was dismissed from the case. The other defendants thereupon moved orally for a change of venue to Pierce county, upon the ground that they were all nonresidents of Lewis county. This motion came too late. Section 4856, Bal. Code, provides that when the county in which the action is brought is not the proper county the action may, notwithstanding, be

tried therein, unless the defendant at the time he appears and demurs or answers, demands that the trial be had in the proper county. It is too late, after all the issues are made up and the cause has proceeded to trial, and the plaintiff has proven his case to the jury, to make this demand. It is claimed, however, that the defendant Colvin was not made a party in good faith, but was made a party defendant solely for the purpose of having the case tried in Lewis county, and of defeating the change of venue therefrom. We have no doubt that, where a party is made a defendant without any cause therefor, and in bad faith, for the purpose only of prosecuting the case in a particular county where none of the real parties in interest reside, a change of venue may be granted, upon a timely and sufficient showing of such fact. There is, however, nothing in the record to show this state of facts. At the close of plaintiff's case, upon Colvin's motion, the action was dismissed as to him, because plaintiff had failed to connect him with the taking or with possession of the property in dispute. There is no other evidence in the record of bad faith in making Colvin a party. On the other hand, there is some evidence of the fact that Colvin was assisting in driving the cattle away . . ."

This quotation shows that in the *Rector* case no motion for change of venue had been interposed at the time of appearing by demurrer or answer, and it furthermore shows that the defendant resident of Lewis county had been made a defendant in good faith. Neither of the reasons upon which that decision was based exist here, and in addition, as we have already noticed, the case as it now stands is as if there never had been any defendant other than the relator. The motion for a new trial having been granted as to him alone, the writ will issue.

MAIN, C. J., MOUNT, TOLMAN, HOLCOMB, MITCHELL, FULLERTON, and CHADWICK, JJ., concur.

[No. 14913. Department Two. August 27, 1918.]

THE STATE OF WASHINGTON, *on the Relation of J. S. McBride, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent.*[1]

HABEAS CORPUS—DEFENSES—QUARANTINE. It is no defense to habeas corpus proceedings to produce a person detained in quarantine by authority of the state board of health, that the commissioner cannot break quarantine without incurring the penalties of the law, as the order of the court would be a complete protection.

HEALTH—HEALTH ORDINANCES—POWER OF CITY. Notwithstanding Const., art. 20, § 1, provides that the state board of health be created and makes no provision for city boards, a city has power to pass health ordinances and to create the office of health commissioner, when not in conflict with the general law.

SAME—HEALTH ORDINANCES—VALIDITY. Seattle ordinances, Nos. 15,957 and 32,444, providing for quarantine of persons afflicted with contagious diseases, with the right of appeal to the state board of health, does not conflict with general laws; for if sole power is conferred upon the state board, the same is preserved by providing the right of appeal.

HEALTH—QUARANTINE — POLICE POWER — AUTHORITY OF BOARDS—REVIEW BY COURTS—HABEAS CORPUS. The legislature, in the exercise of the police power, has power, by Rem. Code, § 5404 *et seq.*, to create a board of health and to provide that its decisions as to the detention of persons in quarantine shall be final and conclusive; and the courts will not, in habeas corpus proceedings, inquire into the reasonableness of the act, where the legislature makes proper classifications and provides the means and methods for carrying out an ordinance sounding in the police power, the court not going beyond the query whether the subject-matter of the act is within the range of its authority.

CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWERS — HEALTH LAWS. Health ordinances relating to quarantine are not unconstitutional as an unlawful delegation of legislative authority because they leave to health boards definitions and classifications of disease.

EVIDENCE—JUDICIAL NOTICE—HEALTH LAWS. The courts may take notice that the nature of contagious diseases are factors to be con-

[1]Reported in 174 Pac. 973.

sidered in the matter of quarantine and to be left to the judgment of medical experts.

HEALTH—QUARANTINE—VALIDITY. The power of summary quarantine is not to be denied because the authority may be abused or the law maladministered.

HEALTH—STATUTES—CONSTRUCTION. Health and quarantine laws are to be liberally construed.

Application filed in the supreme court July 23, 1918, to prohibit the superior court for King county from releasing on habeas corpus a person detained in quarantine by order of the boards of health of the city of Seattle and of the state of Washington. Granted.

Hugh M. Caldwell, Thomas J. L. Kennedy, Walter F. Meier, and *Geo. A. Meagher,* for relator.

Smith, Chester, Brown & Worthington, for respondent.

The Attorney General, and *John A. Homer, Assistant, amici curiae.*

CHADWICK, J.—This case grows out of and demands a construction of the quarantine regulations of the city of Seattle and the state law creating a state board of health and defining its powers and duties.

On the 11th day of April, 1918, one Francis Williams was arrested charged with a violation of Ordinance No. 16,046 of the city of Seattle. On the 14th day of April, Williams was given over to the health commissioner of the city for examination. The health commissioner found Williams to be afflicted with a dangerous, infectious and contagious disease known as syphilis, whereupon he was committed to the isolation hospital of the city and he has there since remained.

He appealed to the state board of health, and the finding of the commissioner was affirmed. On July 15th, Williams petitioned this court for a writ of

habeas corpus, alleging that he was arrested, as he believes, without a warrant and without being informed against, and that he is being held on a pretended claim vexatiously instigated by some police officer that he is afflicted with some dangerous, contagious and infectious disease; that such charge is unfounded and in fact untrue; that he is not now, nor at any time during his detention has been, so affected; that, as he believes, the alleged cause of his detention is but a subterfuge in furtherance of a conspiracy on the part of the police department, aided and acquiesced in by the health department, to unjustly deprive him of his liberty; that he has been detained in unsanitary, filthy and poorly ventilated quarters crowded with inmates who are suffering from various ailments, and is forced to use the same soap and a common drinking cup; that he is fed on unwholesome food and forced to submit to arbitrary medical treatment in furtherance of the design to detain him, without the privilege of having or consulting a physician of his own selection.

Upon this showing we ordered that a writ issue returnable on the 17th day of July to the superior court of King county for inquiry as to the time and cause of the detention of the petitioner.

The matter coming on for hearing, the petitioner asked that physicians be appointed to examine him. Superior Judge Tallman, before whom the case was called, appointed three physicians to examine the petitioner. The order was obtained *ex parte* and without formal notice. On the next day the city attorney petitioned Judge Dykeman, Judge Tallman then being out of the city, to vacate the order as improvidently made, contrary to the law, and without sustaining jurisdiction. Judge Dykeman having announced his intention of enforcing the order made by Judge Tallman, the health commissioner came to this court and procured

an order to show cause why a writ of prohibition should not issue restraining further proceedings. We understand that all questions of procedure are waived, to the end that the issues hereinafter to be noted may be finally determined by this court.

It is alleged that Williams was arrested and is detained as a disorderly person under the provisions of Ordinance No. 16,046, "an ordinance for the preservation of the public morality, peace, safety and good order of the city of Seattle, etc."

That he is now held under the provisions of Ordinance No. 15,957 and Ordinance No. 32,444. In the latter ordinance it is provided that:

"Whereas, by reason of investigations made by the Sanitation Department and under its direction, the public welfare requires the examination of persons of both sexes taken into custody by the Police Department of the city for the purpose of preventing the spread of infectious and contagious diseases; now, therefore,

"Be it ordained by the city of Seattle as follows:

"Section 1. For the purpose of preventing the spread of contagious and infectious diseases or maladies, it shall be the duty of the Sanitation Department of the City of Seattle to duly examine in such manner and by such methods as modern science has found to be proper all persons who are taken into custody by the Police Department of the city, who are suspected of being afflicted with any contagious or infectious disease or malady, and the Sanitation Department and the Commissioner of Health are hereby authorized and empowered, and it shall be their duty, to order any such persons so taken into custody to be examined for such purpose."

Ordinance No. 37,928, amendatory of Ordinance No. 15,957, provides:

"Section 6. Whenever it shall come to the knowledge of the Commissioner of Health of the City of

Seattle that any adult therein has chickenpox, or any person therein has smallpox, varioloid, syphilis, gonorrhoea, or any other contagious or infectious disease of a similar or different kind from that herein specified, or any disease or sickness dangerous to the public health, said Commissioner is hereby authorized and empowered, and it shall be his duty to forthwith, whenever in his judgment it is safe, expedient and practicable, cause such infected person to be removed to and kept in a hospital, sanitarium, a separate house, or such place as may be designated by the Commissioner of Health, or as may be by law or ordinance provided therefor, and cause said person to be properly treated and cared for, and to make such other rules and regulations as may be necessary or advisable for the protection of the public health."

Then follows, *inter alia,* a legislative assertion of existing local conditions calling for the exercise of the police power.

Sec. 1, art 20, of the state constitution provides that "There shall be established by law a state board of health . . . with such powers as the legislature may direct."

It is also provided, § 11, art. 11, that "any county, city, town or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with the general laws." The legislature in obedience to the warrant of the constitution has passed general laws creating a state board of health and defining its duties. The law seems to have been drawn upon the theory that the municipalities would exercise their power to enact such measures as they saw fit to care for, protect, and preserve the public health. That such thought prevailed is evidenced by reference to § 7507, wherein the general powers of cities of the first class are enumerated. Power is granted "To erect and establish hos-

pitals and pesthouses, and to control and regulate the same." (Subd. 17.)

"To restrain and provide for the punishment of vagrants, mendicants, prostitutes, and other disorderly persons;

"To provide for the punishment of all disorderly conduct, and of all practices dangerous to public health or safety, and to make all regulations necessary for the preservation of public morality, health, peace, and good order within its limits, and to provide for the arrest, trial and punishment of all persons charged with violating any of the ordinances of said city; but such punishment shall in no case exceed the punishment provided by the laws of the state for misdemeanors." (Subds. 35, 36.)

In the act creating the state board of health, it is provided:

"The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people of the state. The board shall have *supreme* authority in matters of quarantine, and may declare and enforce it when none exists, may modify, relax or abolish it when it has been established. The board may have special or standing orders or regulations for the prevention of the spread of contagious or infectious diseases, . . . It shall be the duty of all local boards of health, health authorities and officials, officers of the state institutions, police officers, sheriffs, constables, and all other officers and employees of the state, or any county, city or township thereof, to enforce such quarantine and sanitary rules and regulations as may be adopted by the state board of health, and in the event of failure or refusal on the part of any member of said boards or other officials, or persons in this section mentioned to so act, he or they shall be subject to a fine of not less than fifty dollars, upon first conviction, and upon conviction of second offense of not less than one hundred dollars." Rem. Code, § 5406.

"In case of the question arising as to whether or not any person is affected or is sick with a dangerous,

contagious or infectious disease, the opinion of the health officer shall prevail until the state board of health can be notified, and then the opinion of the executive officer of the state board of health, or any member or physician he may appoint to examine such case, shall be final." Rem. Code, § 5546.

"The term 'dangerous, contagious or infectious disease,' as used in this act shall be construed and understood to mean such disease or diseases as the state board of health shall designate as contagious or infectious and dangerous to the public health." Rem. Code, § 5547.

There are two questions discussed by counsel that may be summarily disposed of; the first being that the commissioner cannot obey the order of the court and bring his ward into the presence of the physicians appointed to examine him or into court without subjecting himself to the penalties of the law, and for that reason the writ of habeas corpus will not issue. The law contemplates no such absurdity. If the court has jurisdiction to inquire into the cause of his detention, resort to examination and expert opinion by those skilled in the diagnosis of disease would not be a breaking of the quarantine. The law is not aimed at such situations. The order of the court would be a complete defense. *State ex rel. O'Bannon v. Cole,* 220 Mo. 697, 119 S. W. 424, 22 L. R. A. (N. S.) 990.

The other proposition is that the city has no authority to pass health ordinances or to create the office of health commissioner. It is true that the constitution provides that a state board of health shall be created and makes no provision in terms for the establishment of city boards of health; but a city has general power, both by statute and at common law, to enact all necessary police regulations for the preservation of the morals and health of its inhabitants, the only limitation being a contrary provision of the general law.

We find no conflict between the general law and the city ordinances, they seem to have been drawn with careful regard to the harmonious working out of the problems of public health. *State ex rel. Rose v. Hindley*, 67 Wash. 240, 121 Pac. 447. For, if there be sole power in the state board, that power is satisfied by the preservation of a right of appeal to the state board. The order then becomes the act of the state board, for we cannot concern ourselves with the methods provided by law for the exercise of a jurisdiction founded in the constitution.

This case really presents all the features of a return to the petition for a writ of habeas corpus, and we shall treat it as such and shall refer to Williams as the petitioner and the health commissioner as the relator.

It is the contention of the petitioner that to deny him a review of the findings of the health officers is to suspend the writ of habeas corpus; that the boards of health are not immune to judicial review and that their actions and findings are open to judicial inquiry the same as other boards, institutions and officers. "Their determinations are not final and conclusive; if they were, then the exercise of such summary power could not be upheld." Bailey, Habeas Corpus, § 106; *People ex rel. Copcutt v. Board of Health of Yonkers*, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. 522, 23 L. R. A. 481. And counsel undertakes to fix a boundary line beyond which the state cannot arbitrarily extend the police power. It is, "The legislature may not under guise of police regulation arbitrarily invade personal rights—when those rights are involved it becomes the duty of the court to inquire into it." Relator on the other hand takes the position that it is not only within the power of the legislature to provide that the findings of the state board of health shall be final, but

that, it having done so, the courts cannot under the pretense of a habeas corpus proceeding sit in review of its findings.

This then is the controlling question—Whether the legislature has power to create a board of health and make its rulings final and conclusive when called in question in a court of general jurisdiction.

In *People ex rel. Copcutt v. Board of Health, supra,* it is maintained that an attempt to make a finding of the board conclusive (the law did not make it so) would violate the constitutional right of the one detained. In the case of *In re Smith,* 146 N. Y. 68, 40 N. E. 497, 48 Am. St. 769, 28 L. R. A. 820, while granting the power of the legislature to provide summary methods for the suppression and control of disease, it is strongly insinuated that the acts of the board cannot be upheld, unless a state of facts is shown that will warrant the restraint, otherwise a writ will issue. But it seems to us that these cases are not controlling. They were rightly decided upon the law of the case, but their insinuations are not to be sustained.

A writ of habeas corpus is a writ of right, and is never to be denied in any case where the liberty of the subject is made the subject of inquiry. But it has always been held that a return showing a legal cause for the detention of a petitioner is enough to suspend the operation of the writ. The power to detain one who is suspected of having a contagious disease rests in the police power, and to this extent the authority of the commissioner is not challenged, but the right to restrain a subject without judicial review is vehemently denied.

"The police power is to the public what the law of necessity is to the individual." *State v. Mountain*

Timber Co., 75 Wash. 581, 135 Pac. 645, L. R. A. 1917D 10.

"Private rights must be deemed to be subordinate to the general interest of the public . . . And in respect of personal right every citizen is bound to conform his conduct and the pursuit of his calling to such general rules as are adopted by society, from time to time, for the common welfare." Parker and Worthington, Public Health and Safety, § 12.

"The state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." McGehee, Due Process of Law, 301.

See, also, *Manigault v. Springs*, 199 U. S. 473; *State v. Somerville*, 67 Wash. 638, 122 Pac. 324.

And since *Barbier v. Connolly*, 113 U. S. 31, it has been held that the limitations of the Fourteenth Amendment were not intended to interfere with the exercise of the police power on the part of the state.

"Nor can it justly be said that the proceedings of the authorities, with respect to the special orders mentioned, do not constitute 'due process of law,' or that they violate 'the law of the land' for any of the following reasons, namely:

"(1) That the functions of accuser and judge are blended in the same body; (2) That no process is served, or notice of the proceedings given to the parties interested; (3) That the judgment precedes the trial; (4) That the accused is not confronted with the witnesses against him; (5) That the testimony is not under oath; nor the ordinary rules of evidence observed; or (6) That no means are afforded to the accused to compel the attendance of witnesses." Parker and Worthington, Public Health and Safety, § 88.

See, also, *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

If the legislature makes proper classification or prescribes methods, the reasonableness of its acts must rest in the nature of the subject treated.

"The test of reasonableness is applicable alike to the statutes of the legislature passed in the exercise of the police power and to the acts of local municipal legislative bodies acting under powers delegated by the legislature. The English courts have from time immemorial applied the test to municipal legislation, and our courts assume a much more untrammelled attitude in examining the reasonableness of municipal ordinances. Yet every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community." McGehee, Due Process of Law, page 308.

In testing the reasonableness of an ordinance or legislative conduct sounding in the police power, the courts have not been inclined to go beyond the query, whether the subject-matter of the act is within the range of its authority, and having so determined they will not revise, correct or nullify the methods and means employed to accomplish the purpose of the law. That the preservation of the public health is a proper subject for the exercise of the police power goes without saying; indeed, it is the first concern of the state.

"The discussion of modern police regulations has revealed the tendency of judicial and public opinion to translate the maxim, *salus populi suprema lex;* the public health is the highest law; and whenever a police regulation is reasonably demonstrated to be a promoter of public health, all constitutionally guaranteed rights must give way, to be sacrificed without compensation to the owner." Tiedeman, State and Federal Control of Persons and Property, § 169.

Indeed, it may be said that, where the police power is set in motion in its proper sphere, the courts have no jurisdiction to stay the arm of the legislative branch of the government, for it is operating in its own particular field, where even the courts are powerless to insist upon a procedure consistent with the forms of the common law. Some courts have held that the discretion and judgment of administrative officers, while very broad, is not absolutely and in all cases beyond judicial control, but the tendency is away from this doctrine, for, granting the right to question means and methods in one case, the questions of fact upon which the administrative order is based might be raised in every case, and the object of the law, which is to deal summarily, to the end that imminent peril to the public may be averted, would be wholly overcome. At any rate, a somewhat extended exploration of the books convinces the writer that a court should not inquire into the reasonableness of an ordinance sounding in the police power in any case where the legislative body has provided the means and methods of carrying it into effect.

That a city council may pass ordinances under its general powers to promote and preserve the public health, even to the extent of doing that which would be rejected as unreasonable if passed under its authority to legislate with reference to corporate affairs, is affirmed, as we read the text, by Judge Dillon.

"In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." Dillon, Municipal Corporations (5th ed.), par. 600.

And the author, in commenting on the case of *Ex parte Vance,* 42 Tex. Cr. 619, 62 S. W. 568, credits it with approval of the text just quoted, and "as holding that the court may pass upon the reasonableness of an ordinance passed in pursuance of an express grant of power from the legislature where the mode of the exercise of the power is not prescribed, or the legislature has not acted directly on the subject."

The Federal government has, in the exercise of its sovereignty and for many years, assumed to hold immigrants for examination and possible quarantine. Under the Federal statutes and the regulation of the department, the executive officers are given a discretionary power to determine the right of an immigrant to land. There may be an appeal to the secretary having charge of immigration affairs. It is provided that his decision shall be final. In *Nishimura Ekiu v. United States,* 142 U. S. 651, the supreme court denied a writ of habeas corpus. It was contended that the law giving the immigration officers exclusive authority to determine the right of a party to land was so far unconstitutional as to deprive the petitioner of her liberty without due process of law.

"Congress may, if it sees fit, as in the statutes in question, in *United States v. Jung Ah Lung,* just cited [124 U. S. 621], authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted. *Martin v. Mott,* 12 Wheat. 19, 31;

Philadelphia & Trenton Railroad v. Stimpson, 14 Pet. 448, 458; *Benson v. McMahon,* 127 U. S. 457; *In re Oteiza,* 136 U. S. 330. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. . . .

"The decision of the inspector of immigration being in conformity with the act of 1891, there can be no doubt that it was final and conclusive against the petitioner's right to land in the United States. The words of section 8 are clear to that effect, and were manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official superiors, and in accordance with the provisions of the act."

See, also, *United States ex rel. Schleiter v. Williams,* 203 Fed. 292; *United States ex rel. Aronowicz v. Williams,* 204 Fed. 844; *United States v. Gin Fung,* 100 Fed. 389.

In *United States v. Ju Toy,* 198 U. S. 253, the court seems to have removed the doubt, theretofore existing, as to whether the rule of its former decisions would be extended to one who claimed to be a citizen of the United States. The court held the act to apply, "whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as when it is domicile and the belonging to a class excepted from the exclusion acts," and

"But it is not improper to add a few words. The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be entrusted to an executive officer and that his decision is due process of law was affirmed and explained in *Nishimura Ekiu v. United States,* 142 U. S. 651, 660, and in *Fong Yue Ting v. United States,* 149 U. S. 698, 713, before the authorities to which we already have referred. It is unnecessary to repeat the often quoted remarks of Mr. Justice Curtis, speaking for the whole court in *Murray's Lessee v. Hoboken Land & Improvement Co.,* 18 How. 272, 280, to show that the requirement of a judicial trial does not prevail in every case."

It would seem that the analogy of these cases is complete, but, if it be not so it would appear that we have held in principle as we are now holding. In *Davison v. Walla Walla,* 52 Wash. 453, 100 Pac. 981, 132 Am. St. 983, 21 L. R. A. (N. S.) 454, we held that things done under the police power may be done without resort to judicial proceedings, and in *State v. Somerville,* 67 Wash. 638, 122 Pac. 324, we said:

"Many courts have held that a large discretion is necessarily vested in the legislature when exercising that power, and that the legislature may determine not only what the public interest demands, but also what measures are requisite and necessary to secure and protect the same."

And in the concurring opinion by the writer of this opinion:

"Where the facts depend upon proof, I think it is competent for the legislature to pass a labor law covering any particular industry, and that the law will be binding upon the courts regardless of the showing that might be made in any particular case. If it were otherwise, we would have a law for 'special cases,' and we could not depend upon general laws, for the obvious reason that the legislature could not pass a law with any assurance that it would be general in its application."

In *State ex rel. Puyallup v. Superior Court,* 50 Wash. 650, 97 Pac. 778, the uncertainty of the statute was urged against the right of a city council to revoke a liquor license except for a cause sufficient to stand the test of judicial review. It was held:

"It is not authority to regulate under certain circumstances, or to restrain under certain circumstances, but the authority is absolute and unlimited, and it is evident that the legislature intended to refer the whole subject to the city council."

The provision that the finding of the health officers shall be final is a sufficient evidence of legislative intent to leave the whole matter to the health officers without restraint on the part of the courts. The case just cited rested upon, and is sustained by, *State ex rel. Aberdeen v. Superior Court,* 44 Wash. 526, 87 Pac. 818.

We are unable to draw a line that would logically differentiate this case from the principle involved in those cases where the courts have sustained findings of medical and dental boards. If it is within the power of the legislature to provide for the licensing of all those who are skilled in the profession devoted to the health of the people, and to lodge the determination of their qualifications in a board of professional men, it ought to follow that the legislature could provide by a similar law for taking the judgment of men having

the same skill upon a question of fact as to the existence of, or whether a given person was, or is, afflicted with a contagious, dangerous or infectious disease. The right is sustained because the act of such board is in no sense judicial. *State v. Bonham,* 93 Wash. 489, 161 Pac. 377, L. R. A. 1917D 996; *Reetz v. Michigan,* 188 U. S. 505; 30 Cyc. 1550.

The power of the state board to determine the qualification of dentists and physicians has been repeatedly affirmed in this state. *State ex rel. Smith v. Board of Dental Examiners,* 31 Wash. 492, 72 Pac. 110; *Brown v. State,* 59 Wash. 195, 109 Pac. 802; *State ex rel. Brown v. Board of Dental Examiners,* 38 Wash. 325, 80 Pac. 544, where the court said:

"The general rule is well established that the courts cannot review the discretion which has by law been vested exclusively in inferior tribunals."

Our conclusions are not in accord with the text of Bailey, but he is content to rest his conclusions upon the two New York cases referred to in the fore part of this opinion. To follow him would make the exercise of the police power a judicial function. We find nothing in our decisions or in the reasons of the law to sustain such doctrine.

The sustaining grace of the police power being in its inceptions and general application rather than in its consequences as applied to individual cases, we hold that the ordinances of the city of Seattle and the state law are founded in sound reason.

It is finally contended that the law is unconstitutional in that it delegates legislative power to the health boards, in that it leaves to them definitions and classifications of diseases. This court has not heretofore considered similar laws as a delegation of legislative power or authority. The legislation is that of

the legislative body, but it is not always practical to meet every phase of the necessity that has called for the law by the enactment of a general statute.

The legislature may well have taken notice of the fact that the nature, virulency and extent of territory covered by contagious and infectious diseases, whether endemic or epidemic, are all factors to be considered in the matter of quarantine, and that, after all, the whole working of a plan for quarantine must depend upon the judgment and discretion of men learned in the science of medicine, and that doctors sometimes disagree. The legislature, as well as the courts, would be helpless in such matters without resort to expert opinion, and their judgments would necessarily lie in greater or less degree in the facility of witnesses and the skill of counsel. It is most likely that the legislature sought to avoid the confusions and delays that must necessarily follow if arbitrary classifications were attempted in the statute, for if it had the power to say, in emergency —in self-defense—that, inasmuch as the whole matter of quarantine must rest ultimately in the judgment of medical men, it could avoid the danger of partisan opinion and fix the seat of that judgment in men of its own choosing, or to be chosen in a way provided, and who, being bound by oath to perform a public duty, and having a due sense of responsibility, presumably would discharge their office with justice and fidelity. We may well adopt the language of the court in another case:

"Because the state has, as in this instance, determined upon and specified the officers upon whose judgment on the questions submitted to them the state is willing to rely. Taking the case at bar for example, if a record of the examination had been produced in court, with the questions, answers, and credits given to each question, who would determine whether or not a particular answer had received a sufficient credit? Certainly not the jury, for they are not presumably

competent to pass a proper judgment on such subjects. Not the judge, for his qualifications do not embrace, or at least require, an expert knowledge of the science of dentistry. Expert witnesses could not be properly permitted to testify, for the reason that the state has already designated and empowered experts to pass upon these questions presumably by reason of their recognized qualifications." *State ex rel. Brown v. Board of Dental Examiners,* 38 Wash. 325, 80 Pac. 544.

Nor is there any legal reason for denying the power to quarantine summarily, or to restrain for treatment, a citizen or subject because the authority may be abused or the law maladministered in a given case. *Brown v. State,* 59 Wash. 195, 109 Pac. 802; *In re Thompson,* 36 Wash. 377, 78 Pac. 899. It is settled that laws and ordinances creating boards of health and granting wide powers for the effective and effectual carrying out of the legislative plan for protecting health, must be liberally construed. For as Mr. Freund says in his work on Police Power, § 446:

"The detention of persons affected with or suspected of contagious disease in quarantine presents one of the cases where the police power is literally the law of self-protection and paramount necessity."

We must credit the legislature with a consideration of these things.

The state board of health and the health commissioner of the city of Seattle

"Being the agency created by the legislature to prevent the outbreak and spread of disease, and to remove causes of sickness, the presumption is always in favor of the board of health, and its action will not be interfered with unless it appear unreasonable or oppressive. The fact that its membership may sometimes be composed of extremists is no reason for denying the power conferred by the legislature. Nor should we be controlled by the fact that a scientific theory of today may be discarded tomorrow. In matters affecting

the public health it is the part of reason and common sense to adopt the best scientific thought of the age in which we live. If research and investigation lead to other accepted theories, then we must adopt them. Were the rule otherwise, both the courts and the legislature would be without a competent guide." *Board of Health of Covington v. Kollman,* 156 Ky. 351, 160 S. W. 1052, 49 L. R. A. (N. S.) 354.

The rule being that health laws shall be liberally construed, the power of the legislative branch of the government is not to be lightly interfered with or set aside. Courts will not seek for an opportunity to declare a right of appeal or review in cases resting in public necessity.

We find, as the supreme court of New Jersey found in a similar case:

"But upon the general merits of the controversy, we are unable to perceive anything in the legislation referred to conferring upon the Common Pleas the right to review the conditions, and the emergency in the locality, which prompted the board of health to impose the restrictions and quarantine complained of in this case. We are unable to perceive any authority in the legislation itself or in the public policy upon which it is based which can be said to contemplate the submission to a legal tribunal of the public necessity, which requires in an emergency the prompt and expeditious intervention of a board to which the legislature for the protection of life and health, in a community, has especially committed the determination of the facts." *Board of Health v. Union Common Pleas,* 83 N. J. L. 392, 85 Atl. 217;

For, as said in that case, to assume to review a finding of a properly constituted officer vested with authority to determine a fact in a critical situation involving detriment to the life and health of a community is tantamount to a declaration that the police power of the city is moribund and useless.

Finally, we hold that it is within the power of the legislature, in dealing with the problems of public health, to make the determination of a fact by a properly constituted health officer final and binding upon the public as well as upon the courts.

Having so concluded, the writ will issue.

MAIN, C. J., FULLERTON, HOLCOMB, and MOUNT, JJ., concur.

[No. 14449. *En Banc.* August 27, 1918.]

DAVID REA *et al.*, *Appellants*, v. TACOMA MAUSOLEUM ASSOCIATION, *Respondent*.[1]

NUISANCE—WHAT CONSTITUTES—MAUSOLEUM. An addition to a mausoleum will not be restrained as a nuisance injuriously affecting adjoining residence property merely because it is to become a permanent sepulture near a residence, when it will not by the emission of fumes or drainage affect the physical senses or health of people residing near it.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered May 21, 1917, dismissing an action to enjoin the erection and maintenance of a mausoleum, after a hearing before the court. Affirmed.

Gordon & Easterday and *Carroll A. Gordon*, for appellants.

Fletcher & Evans, for respondent.

PARKER, J.—The plaintiffs, Rea and wife, seek an injunction against the defendant, Tacoma Mausoleum Association, enjoining it from erecting and maintaining upon its land near their residence an addition to its present mausoleum. Trial upon the merits in the

[1]Reported in 174 Pac. 961.

superior court for Pierce county resulted in judgment denying to the plaintiffs the relief prayed for, from which they have appealed to this court.

Appellants have for several years owned and occupied their present home in Tacoma, consisting of three lots, each 25 by 120 feet in area, with a dwelling-house thereon. The north line of their premises is the width of two lots, fifty feet, south of and parallel with the south boundary of Oakwood Cemetery, which had been established and maintained for many years. Several years ago, respondent acquired land within the cemetery, bordering on its southerly boundary, opposite appellants' premises. In the year 1911, it completed on this acquired land a mausoleum in which it has deposited from time to time dead bodies, maintaining the same as a place of permanent sepulture. The south wall of the mausoleum is just within the south boundary of the land acquired by respondent from the cemetery, and the southeast corner thereof is north and a little west of appellants' house, about sixty-five feet distant therefrom. The mausoleum is 70 by 120 feet upon the ground, is thirty feet high, and contains 864 crypts, nearly all of which have been sold and a large number of which are already occupied. Since building its mausoleum respondent has acquired four lots approximately 50 by 260 feet in area, lying east and west along the south boundary of the land acquired by it from the cemetery, the easterly one hundred and twenty feet of which lies immediately north of appellants' premises. On these lots it proposes to erect an addition to its mausoleum containing 1,050 crypts, of substantially the same character as the present one, covering an area 50 by 215 feet, the south wall of which will be within an inch or two of the entire north boundary of appellants' premises. It is the erection

and maintenance of this addition which is sought to be enjoined, no complaint being made against the maintenance of respondent's present mausoleum. The outer walls of this addition, like the present structure, will be constructed of solid concrete eigth inches thick. They will have no openings except possibly one door in the easterly end wall. The crypts will be constructed in sections inside of the outer walls of the same material, but reinforced with iron rods so that each section will form a solid mass of reinforced concrete crypts, without any vacant spaces therein other than the crypts themselves. They will be of such strength, as described by the contractor, that "you could take a section of these crypts and tumble them down the side of a mountain and they would not break apart." The walls of the sections of the crypts will be six inches thick, and the southerly wall of the southerly section will be four inches from the southerly outer wall of the addition, so that between the southerly end of the crypts in that section and the southerly side of the outer wall there will be the two walls and the air space, occupying in all a width of about twenty inches. As each body is placed in a crypt the opening will be filled and sealed with concrete so that each casket and body will be immediately surrounded by solid concrete walls six inches thick. The crypt will then be air tight, except that small pipes will lead from each crypt to a common opening through and above the roof of the building. The record all but conclusively shows that the sanitation of this addition, like that of the main structure, will be practically perfect; so that no fumes or drainage whatever will escape therefrom which will be in the least detrimental to the health of the appellants or others living in the neighborhood, or offensive to their physical senses. The south wall of the addition will be about twenty feet from appellants' house

and about twelve or fourteen feet from the extreme northerly edge of a porch thereto. The construction of this addition will not be in violation of any statute of the state, or ordinance of the city of Tacoma relating to cemeteries or other places of sepulture.

The facts shown by this record, we think, render it clear that our problem is reduced to this: Are appellants entitled to injunctive relief, restraining the construction and maintenance of this proposed addition to respondent's mausoleum merely because of the fact that it is to become a place of permanent sepulture so near to their residence, when it will not by the emission of fumes or drainage affect the physical senses or health of appellants or others residing equally near to it? That is, are the mere claimed unpleasant thoughts which its presence constantly suggests, though such effect of its presence may lessen the market value of appellants' premises, such as to entitle them to the relief prayed for? The authorities seem to hold with practical unanimity that cemeteries as places of permanent sepulture for the dead are not nuisances *per se*, and this, it seems to us, must also be the law with reference to permanent sepulture in a mausoleum, built above the ground, when such mausoleum incloses bodies with equal security as by ordinary interment in the earth. A mausoleum would seem to be no more suggestive of the presence of the dead than the ordinary tombstones so common in our cemeteries. In 5 R. C. L. 235, the learned editors state the general rule of nuisance as applied to cemeteries as follows:

"As public cemeteries, for the orderly and decent sepulture of the dead, are necessary requirements for all populous communities, private convenience must yield to the convenience of the public in fixing sites for them and the courts should be particularly careful not to interfere to prevent such establishments, unless

the mischief be undoubted and irreparable. The decided weight of authority may be said to be to the effect that a cemetery is not *per se* a nuisance."

In *Ellison v. Commissioners of Town of Washington,* 58 N. C. (5 Jones' Eq.) 57, 75 Am. Dec. 430, it is said:

"If the grounds be arranged and drained, and the burial of the dead be conducted as elsewhere in such establishments, we incline decidedly to the opinion, it will not be a nuisance, either public or private. The word nuisance is, of course, used here in its legal sense, and is confined to such matters of annoyance, as the law recognizes and gives a remedy for. The *unpleasant reflections* suggested by having before one's eyes, constantly recurring memorials of death, is not one of these nuisances. Mankind would, by no means, agree upon a point of that sort, but many would insist that suggestions thus occasioned would, in the end, be of salutary influence. The death-head is kept in the cell of the anchorite, perpetually before his eyes as a needful and salutary monitor. The nuisance, which the law takes cognizance of, is such matter as, admitting it to exist, all men, having ordinary senses and instincts, will decide to be injurious."

In *Monk v. Packard,* 71 Me. 309, 36 Am. Rep. 315, in a decision which has become a leading one upon this subject, Judge Virgin, speaking for the court, touching the right of the plaintiff to injunctive relief against the maintenance of graves close to and in plain sight of his residence, said:

"The new cemetery was tastefully graded and suitable headstones erected at the several graves, the nearest being about forty feet from, and opposite to the window of the plaintiff's sitting room, and also in plain view from his front windows and door. As first located, the graves were only visible from the back rooms of his house.

"The plaintiff claimed this new grave yard to be a nuisance, for the reason that its proximity and rel-

ative position render his residence uncomfortable and the enjoyment of his property disagreeable; and that it has rendered the water in his well unpalatable and unwholesome, and has lessened the market value of his property."

After holding that the evidence failed to show cause for relief upon the ground of contaminating the water in plaintiff's well, the court further said:

"Nor can the verdict be sustained upon the sole ground of the cemetery's proximity to the plaintiff's premises, and the consequent depreciation of the market value of his property. For a repository of the bodies of the dead is as yet indispensable, and wherever located, it must *ex necessitate* be in the vicinity of the private property of some one who might prove its market value injuriously affected thereby. *New Orleans v. Wardens, etc.*, 11 La. An. 244.

"But assuming that the jury, in respect to these matters, found in behalf of the defendants and concluded that there was no injury to the plaintiff's property, or to his physical health or comfort, and based their verdict solely upon the ground that, on account of its relative position with the plaintiff's house, the cemetery inevitably meets his immediate view whenever he looks from the north window of his sitting room or steps from his door, and that thereby the comfortable enjoyment of his dwelling house is interfered with—then the defendants contend that the verdict is against law—upon the ground that such discomfort is one purely mental, and is not a cause of action.

"It cannot be doubted that the law recognizes that to be a nuisance which is naturally productive of sensible personal discomfort, as well as that which causes injury to property. *St. Helens Smelting Co. v. Tipping*, 11 Ho. L. Cas. 642. But it must injuriously affect the senses of the nerves. Thus sound, whether caused by a locomotive blowing off steam, the ringing of bells or the barking of dogs, whenever it becomes sufficient to injuriously affect residents in the neighborhood, is actionable. *First Baptist Church v. R. R. Co.*, 5 Barb. 79, and cases there cited. To become action-

able, the effect of sound must be such as naturally to interfere with the ordinary comfort, physically, of human existence, and the inconvenience must be 'something more than fancy, delicacy or fastidiousness.' Cooley, Torts, 600.

"Cemeteries are not necessarily even shocking to the senses of ordinary persons. Many are rendered attractive by whatever appropriate art and skill can suggest, while to others of morbid or excited fancy or imagination, they become unpleasant and induce mental disquietude from association, exaggerated by superstitious fears. The law protects against real wrong and injury combined, but not against either or both when merely fanciful.

"The human contents of these graves cannot, as they lie buried there, offend the senses in a legal point of view. The memorial stones alone affect the senses, and the same would result to the superstitious, though nothing human lay beneath them. If this burial ground is under the circumstances a private nuisance, then it is also a public nuisance to every traveller who passes on that road."

No decision has been called to our attention wherein any court has awarded injunctive relief, rested upon the sole ground of the mere presence of a cemetery or other place of sepulture, unattended by injurious or offensive drainage or fumes, sensible to the complaining party, and our own search leads us to believe that no such decisions have been rendered. Among the decisions holding in harmony with those above quoted from, we note the following: *Lambert v. Norfolk,* 108 Va. 259, 61 S. E. 776, 128 Am. St. 945, 17 L. R. A. (N. S.) 1061; *Dunn v. Austin,* 77 Tex. 139, 11 S. W. 1125; *Elliott v. Ferguson,* 37 Tex. Civ. App. 40, 83 S. W. 56; *Woodstock Burying Ground Ass'n v. Hager,* 68 Vt. 488, 35 Atl. 431; *Clinton Cemetery Ass'n v. McAttee,* 27 Okl. 160, 111 Pac. 392, 31 L. R. A. (N. S.) 945; *Musgrove v. Catholic Church of St. Louis,* 10 La. Ann. 431; *Westcott v. Middleton,* 43 N. J. Eq. 478, 11

Atl. 490. In the last cited case this view of the law was applied to an undertaking establishment.

The following decisions, read superficially, might seem to lend some support to the contention of counsel for appellants, but when critically examined they will each be found to involve the emission of fumes or drainage, affecting the physical senses of those in the neighborhood: *Clark v. Lawrence,* 59 N. C. (6 Jones' Eq.) 83, 78 Am. Dec. 241; *Jung v. Neraz,* 71 Tex. 396, 9 S. W. 344; *Bellevue Cemetery Co. v. McEvers,* 168 Ala. 535, 53 South. 272; *Lowe v. Prospect Hill Cemetery Ass'n,* 58 Neb. 94, 78 N. W. 488, 46 L. R. A. 237.

Counsel for appellants rely upon the following of our own decisions: *Shepard v. Seattle,* 59 Wash. 363, 109 Pac. 1067, 40 L. R. A. (N. S.) 647; *Everett v. Paschall,* 61 Wash. 47, 111 Pac. 879, Ann. Cas. 1912B 1128, 31 L. R. A. (N. S.) 827; *Densmore v. Evergreen Camp No. 147, W. O. W.,* 61 Wash. 230, 112 Pac. 255, Ann. Cas. 1912B 1206, 31 L. R. A. (N. S.) 608. The *Shepard* case involved only the power of the city of Seattle to pass and enforce an ordinance regulating the location and maintenance of private hospitals and sanitariums within the city, it being held that the city had such power as applied to the location and maintenance of private sanitariums for the treatment of inebriates and persons suffering from insanity. The *Everett* case involved the right to injunctive relief as against the maintenance of a private sanitarium for the treatment of persons afflicted with tuberculosis. Relief was granted as prayed for upon the theory that the fear of the public generally, not of the plaintiff in particular, of infection from such an institution by those living near it, was sufficient to entitle the plaintiff to relief under the facts of that case. It was not a question of mere fear or mental unpleasantness apart

from fear of physical infection of disease. The *Densmore* case involved the right of the plaintiff to injunctive relief as against the maintenance of an undertaking establishment very close to his residence. That decision may seem to contain observations lending some support to the contentions of counsel for appellants, but when critically read we think it will be found not to rest upon the mere unpleasantness attending the close proximity of dead bodies, but also upon the fact as therein stated that:

"There is evidence tending to show that noxious odors, gases, especially those arising from the deodorants used in cleansing the premises, would permeate the homes of respondents; that there is danger of infection and contagion from the proximity of the morgue, and the possibility of flies passing from one place to the other."

We think that neither of these of our decisions is controlling in this case.

There are other intervening plaintiffs and appellants in this case owning premises near the proposed addition to respondent's mausoleum. We have referred to Rea and wife as though they were the only parties in the case merely for convenience of expression. What we have said touching the claimed rights of Rea and wife also disposes of the contentions of the other appellants, adversely to them.

The judgment is affirmed.

MAIN, C. J., MOUNT, MITCHELL, TOLMAN, and HOLCOMB, JJ., concur.

[No. 14751. Department One. August 27, 1918.]

PAUL WOLFIN, *Respondent*, v. SHAFER BROTHERS LAND COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURY TO SERVANT—NONDELEGABLE DUTIES—FELLOW SERVANTS. Where an employee was ordered into an elevator shaft to dislodge a piece of lumber, it is the nondelegable duty of the master to protect him from injury by the descent of an elevator operated by a fellow servant, and the failure of the servant outside the shaft directing the plaintiff's work to take the necessary precautions is the negligence of the master, making the law of fellow servants inapplicable.

SAME—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Where an employee was ordered into an elevator shaft to dislodge a piece of lumber, it was not contributory negligence, as a matter of law, for him to enter the shaft without inquiring whether the necessary precautions had been taken to guard against the descent of an elevator which had remained stationary at one of the top floors during the work.

Appeal from a judgment of the superior court for King county, Smith, J., entered November 16, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

J. Speed Smith and *Henry Elliott, Jr.*, for appellant.

Frank E. Hammond, for respondent.

FULLERTON, J.—This is an action for personal injuries brought by the respondent against the appellant. At the time the accident which gave rise to the action occurred, the appellant owned and operated a six-story office building situated in the city of Seattle. The respondent was then an employee of the appellant, working in the building under the direction and control of the janitor of the building, also an employee of the appellant. On the day of the accident, the janitor desired to move some lumber then in the base-

[1]Reported in 174 Pac. 650.

ment of the building to one of the upper floors, and directed the respondent to assist him. The respondent was operating one of the elevators, of which there were two in the building running in shafts constructed side by side. The elevator shaft in which the elevator operated by the respondent ran extended from the basement to the top floor of the building. The other shaft did not start from the basement, but from the main floor of the building, the floor immediately above the basement. The lumber was too long to be put in the cage of the elevator, and, to carry it, had to be placed on the top of the elevator cage. To get it on top of the cage it had to be first passed through the elevator shaft from the basement to the main floor. While engaged in this work, the janitor being in the basement passing the lumber and the respondent on the main floor receiving it, a piece of the lumber in some manner became lodged in the adjoining elevator shaft, and the janitor directed the respondent to enter the shaft and remove it. While in the shaft removing the plank, the other elevator, operated by another employee of the appellant, was brought down upon the respondent, causing the injuries for which he sues.

The first contention of the appellant is that the respondent was injured through the act of a fellow servant and not of a vice principal. The argument is that the respondent and the janitor were with reference to the particular work fellow servants, and that any order given by the one to the other relating thereto was a mere detail of the work, no more binding upon the master than it would have been had the positions of the parties to the work been changed and the respondent had directed the janitor to enter the elevator cage and remove the lodged piece of lumber. In other words, the argument is that the situation is no different from what it would have been had the master

directed two of its servants of equal degree of authority to do the particular work, leaving to the servants the manner of its execution, and one of them had assumed to give directions to the other which resulted in that other's injury. But we cannot think the principle contended for is applicable to the situation here shown. It may be that, had the respondent been injured by the manner in which the work was performed, as for example, by the neglect of some precaution on the part of the janitor while passing the lumber to the respondent, no liability would have attached to the principal. But the accident did not occur by reason of negligence in this respect. The lodging of a plank in the other elevator introduced a new condition, adding an element of danger not connected with the immediate work. The safety of the respondent while in the shaft depended not upon the manner in which the janitor might receive or handle the board when dislodged, but upon the performance of another and independent duty arising out of the exigencies of the case, namely, the duty of so conducting the operation of the elevator that it would not descend upon the respondent while in the elevator shaft. This was a duty devolving upon the janitor outside of and apart from the scope of the immediate work; and his failure as the master's representative to take the necessary precautions was not only negligence on the part of the janitor, but negligence chargeable to the master, on the principle that it is the master's nondelegable duty to provide his servant with a reasonably safe place in which to work, as well as his nondelegable duty to see that his servants are not subjected to unnecessary and preventable hazards.

In sustaining the judgment of the trial court it is not necessary to deny, nor do we deny, the principle announced in the cases of *Desjardins v. St. Paul &*

Tacoma Lumber Co., 54 Wash. 278, 102 Pac. 1034, 132 Am. St. 1140, and *Frengen v. Stone & Webster Engineering Corporation*, 66 Wash. 204, 119 Pac. 193, relied upon by the appellant. Those were cases where the injured servant and the immediate representative of the master were engaged in a common undertaking, and the injury arose from a neglect in the manner of its performance. We held that the representative of the master and the injured servant were fellow servants with reference to the particular work causing the injury. The present case, as we conclude, does not present a like condition.

The other contention is that the respondent was guilty of contributory negligence. This contention is founded on the claim that the respondent entered the elevator shaft with the knowledge that no precaution had been taken to stop the operation of the elevator while he might be engaged in the shaft. But we cannot think the record justifies this conclusion. The most that appears is that he did not stop to so inquire after he had been directed to enter the shaft. It was not shown that he knew no such precaution had been taken. On the contrary the inference is the other way, since it appeared that the elevator had remained stationary at one of the top floors during the time of the work prior to the injury. The question whether the appellant was guilty of contributory negligence was therefore one of fact for the jury rather than one of law for the court.

The judgment is affirmed.

MAIN, C. J., MITCHELL, TOLMAN, and PARKER, JJ., concur.

[No. 14780. Department Two. September 3, 1918.]

VERNON MERRIAM, *as Guardian etc., Appellant*, v. VINTON A. PATRICK, *Respondent*.[1]

HUSBAND AND WIFE—COMMUNITY PROPERTY—CONTROL BY HUSBAND—INSANITY OF WIFE. A husband, appointed as guardian of his insane wife, may convert community realty into personalty and take his one-half of it without accounting to the probate court; as the management and control of community realty remains in the husband notwithstanding the insanity of the wife and appointment of a guardian.

Appeal from a judgment of the superior court for Spokane county, McCroskey, J., entered November 23, 1917, upon findings in favor of the defendant, in an action by a guardian to recover property of an insane ward, tried to the court. Affirmed.

D. R. Glasgow, for appellant.

Danson, Williams & Danson (George D. Lantz, of counsel), for respondent.

MACKINTOSH, J.—When the wife of the defendant Patrick was adjudged insane, she and her husband owned a house and lot valued at about $1,200. After the husband's appointment as guardian, he sold this property under authority of the court, having executed a bond with the defendant surety company as surety, conditioned that he would account for all funds coming into his possession as guardian of his wife's estate. These funds consisted solely of the amount realized from this sale, and from them he paid claims against the estate and resigned his guardianship, taking as his own property one-half of the money remaining in his hands. The plaintiff was thereafter appointed guardian, and commenced this action to secure the res-

[1]Reported in 174 Pac. 641.

toration of the sum so taken. The question here for answer is, Can the husband, who has been appointed guardian of the estate of his insane wife, convert the community real estate into personal property and take one-half thereof as his own, without accounting to the probate court therefor; or, stated a little differently, does the management and control of the community property remain in the husband notwithstanding the insanity of the wife and the appointment of a guardian of her estate?

There is not involved here the husband's duty to support his afflicted wife and to provide the necessaries and comforts required by her. In the light of the fact that insanity may last for a long period and possibly a lifetime, and that the community property may, in many instances, consist of a business that requires special knowledge to conduct, the courts will hesitate to take from the husband the management and control of community property and place it in the hands of the wife's guardian for management during her incapacity, unless the law unquestionably provides for this method. To deprive the husband of the management and control of the community property would virtually divest him of his interest therein, and if the property consisted of a business in which he was engaged, it would possibly deprive his unfortunate wife, in a great many instances, of the support which she is entitled to, for we cannot assume that the husband would in all instances be appointed guardian of his wife's estate.

At the time of the passage of the act which relates to the guardianship of insane persons, being §§ 1654 to 1670, Rem. & Bal. Code, the first community property law of this state had not been enacted; and when that act refers to property subject to the control of the guardian of an insane spouse, it did not have in contemplation community property. Moreover, the

language itself of the act does not include community property, had such property been in existence at the time of the passage of the act. The act throughout in speaking of the property subject to guardianship speaks of "their estates," "the estate of such insane person," "the estate real and personal, of the person under guardianship," "management of his estate," "proceeds of his estate." In other words, by the act the guardian is given the management of property which the insane person possesses, and the guardian can only exercise those rights of management which the ward, when sane, could have exercised. The guardian of an insane wife cannot take over the management and control of the community property, that being given to the husband. If the guardian were entitled to the control and management of the wife's half of the community property the property would, of necessity, have to be divided in some manner. In this case, the community realty having been sold, the husband, in effect, divided it by dividing the proceeds, and, as guardian, had the custody and management of one-half, for which he accounted in the probate proceeding. Under the law, he was not obligated to do even this. We do not hold that the husband is not bound to support and maintain his insane wife out of community property, but there are ways in which husbands seeking to evade that duty may be compelled to perform it; but, as we have stated in the beginning of this opinion, the question of support and maintenance is not involved in this case, our conclusion merely being that the guardian of an insane wife does not, upon his appointment, secure the management and control of community property.

The judgment is affirmed.

MAIN, C. J., MOUNT, and HOLCOMB, JJ., concur.

CHADWICK, J. (concurring)—When the husband had accounted to the court for the whole property and was allowed to retain the one-half that was his own, his discharge as guardian operated as a distribution of funds within the jurisdiction and keeping of the court. The court could not reassert its jurisdiction, and, for the same reason, the successor guardian can assert no interest in the divided fund. I concur upon this ground.

[No. 14778. Department Two. September 3, 1918.]

THE CITY OF EVERETT, *Appellant*, v. J. B. SNYDER *et al.*, *Respondents*.[1]

PRINCIPAL AND SURETY — ALTERATION IN CONTRACT — RELEASE OF SURETY. A contractor's surety is prejudiced, and therefore discharged from liability to the city, where the work was suspended for an indefinite time without notice to the surety, and the full contract price paid before the work was fully completed, contrary to the terms of the contract and bond.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered March 2, 1918, upon findings in favor of the defendant surety company, dismissing an action on contract, tried to the court. Affirmed.

Wm. A. Johnson, for appellant.

J. Y. Kennedy, for respondents.

MOUNT, J.—On April 14, 1915, the city of Everett let a contract to J. B. Snyder for the construction of concrete walks and pavement on Fulton street in that city. The contract price for doing the work was $6,242.50. The work was to be performed within sixty days. The United States Fidelity & Guaranty Com-

[1]Reported in 174 Pac. 643.

pany gave a bond to the city of Everett conditioned that Snyder would faithfully and fully perform the work provided for in the contract. After the contract was entered into, Snyder began the work, and in June the officers of the city required Mr. Snyder to leave certain sidewalks unfinished because of a fill which had been made during the progress of the work, and the officers of the city were of the opinion that this fill should lay over one rainy season and not be completed until the next year. The amount of sidewalk left unfinished was 455.1 square yards, and 4.8 square yards of alley crossing. During the progress of the work, the defendant Snyder had assigned to the First National Bank of Everett all payments which should become due him on the contract. The contract provided that seventy per cent of the contract price should be paid as the work progressed, and thirty per cent thereof should not be paid until thirty days after the work was completed and accepted. After the work was suspended, the city of Everett paid to the First National Bank of Everett the whole amount to become due on the contract. The surety upon the contract had no notice of the discontinuance of the work and no notice of the payment by the city of the full contract price. Thereafter, in the next summer, Mr. Snyder refused to complete the contract, and this action was brought to recover from Snyder and the surety company the estimated cost of completing the contract. Upon these facts the court concluded that Mr. Snyder was liable for the cost of the uncompleted work and entered judgment against him for that amount, and concluded that the surety company was not liable and dismissed the action as to the surety company. The city has appealed from that part of the judgment dismissing the action as to the surety company.

The appellant argues, in substance, that the surety must be held liable because the thirty per cent reserved in the contract until after the completion of the work was solely for the benefit of labor and materialmen, and not for the benefit of the surety company; and that the premature payment by the city did not release the surety company unless it was prejudiced thereby. We think it is plain from the facts stated above—about which there is no dispute—that the surety company was prejudiced, both by the extension of time for the completion of the contract without notice or consent, and by the payment of the full amount of the contract price to the contractor or his order, without notice to, or consent of, the surety company, before the work was completed. The surety company became surety upon the contract as it was written. The contract was to be completed within a definite time. Payments were to be made in a definite manner. We think it cannot be said that, where the work was suspended for an indefinite time upon the agreement of the city and Mr. Snyder, the surety company would be bound thereby without notice; and it seems plain, also, that, where the city paid the full contract price before the work was fully completed, this was a material alteration of the contract without notice to the surety, and would release the surety from the obligation undertaken. In the case of *Black Masonry & Contracting Co. v. National Surety Co.*, 61 Wash. 471, 112 Pac. 517, we said, at page 477:

"The general rule is, if the building owner advances to the builder more than he is entitled to under the contract, the surety will be released. The rule rests upon two reasons. The one is that such advance deprives the surety of the security which the owner or principal contractor has agreed to hold for his benefit, and the loss of the inducement which otherwise would have operated on the contractor's mind to induce him

to finish the work in accordance with the terms of his obligation."

And on page 479 we said further:

"In all the cases decided by this court, and by all other courts holding that payment by the owner would not discharge the principal, the facts have been such that no prejudice resulted by reason of such payments to the surety. But in this case the surety was prejudiced, in the two essentials noticed and endorsed as sufficient by all the books; that is, that they were deprived of that security which their contract gave them; and furthermore, the contractor was relieved of the inducement to perform the labor and furnish the material stipulated in his contract."

See, also, *Maryland Casualty Co. v. Washington National Bank,* 92 Wash. 497, 159 Pac. 689.

We think it is plain in this case that the surety was prejudiced in at least two particulars: First, the life of the contract was extended for about a year, during which time the evidence shows the price of material and labor was substantially increased; second, the full contract price was paid by the city to the contractor or his creditor before the work was done. There was no incentive left to the contractor to finish the work, and even though the thirty per cent which was required by the contract to be held until after the work was fully completed was primarily for the benefit of laborers and materialmen, it was a fund which the surety had a right to rely upon to pay whatever claims might be filed against the bond. The act of the city in delaying the work until the next year and in paying the full contract price before the work was completed, and without the notice or consent of the surety company, made a very different contract from the one which the surety company undertook to guarantee.

We are satisfied, therefore, that the trial court properly concluded that the surety was released from its obligation upon the bond.

The judgment is therefore affirmed.

MAIN, C. J., HOLCOMB, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14726. Department Two. September 3, 1918.]

ENOCH E. MATHISON, *Respondent*, v. WILLIAM ANDERSON *et al.*, *Appellants*.[1]

APPEAL—STATEMENT OF FACTS—STRIKING—TIME FOR MOTION. A motion to strike a statement of facts and dismiss an appeal, not filed until the case was called for hearing, is too late.

CONSPIRACY—DAMAGES—EVIDENCE—SUFFICIENCY. An action for damages for conspiracy to injure plaintiff's business is not sustained, where there was no evidence that plaintiff's business was injured by the acts complained of, and it appears that the suit was not the result of any injury done, but plainly brought to annoy defendants.

Appeal from a judgment of the superior court for Wahkiakum county, Hewen, J., entered July 31, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

J. Bruce Polwarth and *William Stuart*, for appellants.

Enoch E. Mathison and *James H. McMenamin*, for respondent.

MOUNT, J.—This action was brought to recover damages by reason of an alleged conspiracy between the defendants to injure the reputation and business of the

[1]Reported in 174 Pac. 642.

plaintiff. The complaint alleged that the defendants, being postmaster and assistant postmaster at Deep River, in Wahkiakum county, unlawfully opened plaintiff's mail and thereby became possessed of information about plaintiff's business, and thereby destroyed a lucrative logging business and prevented plaintiff from successfully establishing a line of steamers between Deep River, Washington, and Astoria, Oregon; that, by reason of defendants' opening plaintiff's mail, plaintiff was compelled to obtain mail at other post-offices, to his great expense and damage. The complaint prayed for damages in the sum of $62,945. The allegations of the complaint were denied, and the case came on for trial before the court and a jury, resulting in a verdict and judgment in favor of the plaintiff for $835. The defendants have appealed from that judgment.

A large number of errors are assigned, some of which are meritorious. It will be necessary to consider but one of these, to the effect that there was no evidence upon which the case could be submitted to the jury. The respondent has filed no brief upon the merits of the case. He was content to file a belated motion to strike the statement of facts and dismiss the appeal. Aside from the fact that the motion was not filed until the case was called for hearing upon the merits—and was therefore too late—there is no merit in the motion. At the trial there was no evidence whatever that there was any conspiracy between the appellants to injure the respondent, or for any other purpose. There was some evidence that one of the appellants had unlawfully opened some letters addressed to the respondent, but there is no evidence to show that any damage to the respondent flowed, or could reasonably flow, therefrom. The re-

spondent attempted to testify that he was engaged in a profitable logging business which afterwards resulted in failure, and that, at one time, he attempted to engage a steamboat company to run in opposition to a steamer in which appellants owned an interest; but the evidence of the respondent showed that the logging business was not profitable at any time and failed not because of any act of the appellants. The same is true of the steamboat company, which failed because the company did not procure money to establish the business, and for no other reason. The evidence of the respondent showed that, at one time, he had a quarrel with one of the appellants, and that thereafter he was afraid of his life by reason of threats. His evidence showed that his own conduct brought about the quarrel, and that, after that time, he did business with the appellants by purchasing groceries and merchandise on credit, and afterwards gave his note for that indebtedness. The respondent also testified that he made numerous trips to Portland and Astoria, Oregon, and Seattle and Tacoma, Washington, and paid out a large sum of money as expenses. It is apparent that these trips were not caused by anything done or said by the appellants.

The writer of this opinion, after reading the abstract of the record, resorted to the statement of facts, and is satisfied from a careful reading thereof that there was no evidence to submit to the jury upon the issues raised. The suit was not the result of any injury done to the respondent by the appellants, or either of them, but was plainly brought to annoy the appellants.

We are satisfied that the trial court should have dismissed the action upon appellants' motion at the close of the respondent's evidence.

The judgment is therefore reversed and the cause dismissed.

MAIN, C. J., HOLCOMB, and MACKINTOSH, JJ., concur.
CHADWICK, J., concurs in the result.

[No. 14566. Department Two. September 3, 1918.]

PHILIP ZURFLUH, *Appellant*, v. BERT HARTMAN *et al.*, *Respondents*.[1]

MECHANICS' LIENS — PRIORITIES — ACTUAL NOTICE OF MORTGAGE — EVIDENCE. Plaintiff, foreclosing a mechanics' lien, and notified by letter of a superior mortgage, may rely upon an abstract of title and the assurance of the county auditor that there was no such mortgage of record, as a sufficient excuse for not making the mortgagee a party to the action.

SAME — PRIORITIES — ERRONEOUS MORTGAGE — EQUITIES. Where a prior mortgage misdescribed the property upon which mechanics' liens were claimed and foreclosure started, the mortgagee is, as against the innocent lienors, charged with notice of the state of the record, and was bound to set up his mortgage by intervention in the lien foreclosure; and if the equities were equal, he must answer for the oversight as the one first in error.

MORTGAGES—CONSTRUCTIVE NOTICE. That a certain addition to a town plat had no block "D", while the town plat did have, is not sufficient to charge one searching the records with notice that a recorded mortgage upon block "D" in such addition was a mistake and was intended to be upon block "D" in the original plat.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered November 7, 1917, upon findings in favor of the defendants, in an action to foreclose a mortgage, tried to the court. Affirmed.

Fred M. Bond, for appellant.
Lockerby & Wright, for respondents.

CHADWICK, J.—In June, 1916, the defendant Bert Hartman entered into negotiations with Leudinghaus

[1]Reported in 174 Pac. 963.

Brothers for the purchase of lumber and materials for the construction of a building. His negotiations were conducted upon the theory that he would want time for the payment of his account. In a later conversation it was agreed that he would pay cash for the lumber and material. Hartman—and in this he is corroborated by his brother—says that he told Mr. Leudinghaus that he had to borrow the money from his father-in-law and that he thinks he told him that he intended to give a mortgage upon the property upon which the house was to be built. This conversation is denied by the member of the firm who conducted the negotiations. Leudinghaus Brothers furnished the material, the whole of which was delivered between the 11th day of July and the 24th day of August. The account amounted to $1,063.89. Hartman paid $703.83, leaving a balance of $360.06. On the 20th day of October, 1916, Leudinghaus Brothers filed a lien for the balance due, and within eight months began an action to foreclose their lien. The property owned by Hartman was lot 2, in block D, of the town of Lebam, Pacific county, Washington. On the first day of July, 1916, Hartman and his wife executed and delivered a mortgage in the sum of $1,200 in favor of his father-in-law, the plaintiff in this case. The integrity of this transaction is not questioned. For some reason not made clear by the record, the mortgage was not acknowledged until the 5th day of September, 1916. It was recorded on the same day. Early in October, Leudinghaus Brothers wrote to Hartman asking that the bill be paid. Hartman replied under date of October 14th, saying:

"Dear Sirs: I am very sorry but I cannot give you the first mortgage on my building and lots. My father-in-law has the first mortgage on them. But there might be some other way of fixing the papers."

Leudinghaus Brothers replied as follows:

"Dear Sir: We were very much disappointed to learn that you did not keep your agreement on the lumber bill furnished you, when you agreed to pay cash, and also that you had already given a first mortgage on the property.

"We feel that you should make out the insurance policies to us, if not all, at least enough to cover our interest in the building. If you have the insurance all placed you might have one policy assigned to us. The agent who wrote your insurance will attend to this for you. You realize that we must have some security. Will you do this and oblige."

The scrivener who drafted the mortgage made a mistake in the description of the property and described it as follows: Lot 2 of block D, *Patton's Addition to* the town of Lebam. Prior to beginning the action to foreclose, counsel for Leudinghaus Brothers had an abstract prepared. It did not show plaintiff's mortgage. While the action was pending, the attorney for Hartman wrote to the attorneys for Leudinghaus Brothers at Seattle, saying:

"In the foreclosure of your lien in the case of Leudinghaus as plaintiffs and Bert Hartman as defendant, will say that I understand a party by the name of Zurfluh has a $1,200 mortgage upon this property, and I see that you have not made him a defendant, so I was wondering if that, as his mortgage was prior to your lien, and the money furnished and delivered prior to the furnishing and delivering of material, and that as his mortgage is superior to their lien, that whether you had left him out purposely, or whether you had overlooked the fact . . . I am representing Hartman and also Zurfluh, who has the $1,200 mortgage."

The next day, counsel for Leudinghaus Brothers replied as follows:

"Leudinghaus v. Hartman

"We have yours of yesterday concerning the above entitled case. We note particularly what you say con-

cerning a mortgage to Zurfluh. Before commencing action we had Mr. Mills prepare us an abstract commencing with the conveyance to Gibson, November 18, 1909, and this abstract shows no such mortgage as you mention. Will you kindly send us full particulars, including the date of the mortgage and the date and place of record. It may be that we shall wish to make him a party."

To this letter the attorney for Hartman, and who was at the time, and is now, attorney for the plaintiff in this case, made no reply. The attorneys for Leudinghaus Brothers had theretofore obtained the abstract, and had also written to the county auditor asking that he advise them "what transfers, mortgages or other liens have been filed in your office subsequent to July 10, 1916, affecting the title to lot 2, block D, town of Lebam." This letter brought the following reply: "No transfers of any kind have been recorded since the deed of Joseph Gibson, 1911. Our record shows no change to date." Some correspondence was carried on tending toward a settlement. On May 10, 1917, the attorney for Hartman wrote to counsel for Leudinghaus Brothers at Seattle, as follows:

"My Dear Sir: Mr. Zurfluh, who is the father-in-law of Mr. Hartman, states that if you wish to accept $360 in cash that he will furnish the money and pay the claim off, but that is all that he will pay, and he says that he has taken the matter up with the carpenters, and they say that the lumber company sent them lumber and stuff that they did not want, and which was of a different value and a poor grade. Mr. Zurfluh has been doing business with me for the last year and I believe that he is a perfectly conscientious fellow, and it is up to you to accept this amount or not. Yet I am satisfied that it is the best he will do without a lawsuit. Would you let me know how you feel about this matter, and oblige."

This was referred to their clients on the 14th day of May. On May 31, the present attorney for the plaintiff filed an appearance for Hartman and made demand for a bill of particulars. Judgment was thereafter entered, whereupon plaintiff brought this action to reform and to foreclose his mortgage.

It is the contention of counsel that the mortgage is a superior lien for the reason that Leudinghaus Brothers had both actual and a constructive notice of the mortgage, and further, that, having actual and constructive notice, they are now estopped to set up the priority of their lien and judgment, because they did not make appellant a party to the foreclosure proceeding. We think the contention that Leudinghaus Brothers had constructive notice of the mortgage may be dismissed without consideration. Nor do we think that they can be charged with actual notice, or if they are to be so charged, they have overcome the burden of inquiry that the law puts upon one having information of a transaction which might affect his rights by the pursuit of the full measure of diligence which the law requires. The record of a mortgage in which property is misdescribed may be sufficient notice, whether it be called actual or constructive, if the party interested should see or know of the record. At any rate, it may be so admitted. But it is not contended that Leudinghaus Brothers either saw or knew of the record in which the property was misdescribed. Consequently, the only thing that would put them upon inquiry is the letter of Hartman written October 14 in which he says that he had mortgaged the property to his father-in-law, and the letter of the attorney for appellant in which he says that he understood "a party by the name of Zurfluh has a $1,200 mortgage upon this property." It would seem that an abstract of title and the assurance of the county auditor that there was no such

mortgage of record, coupled with a letter from plaintiff's attorney in which he says that he "understands" that there is a mortgage, when he was at the time retained as an attorney to protect the interests of plaintiff and must have actually known of the mortgage at the time the letter was written, is enough to excuse Leudinghaus Brothers from the duty that was upon them to make all known lienholders a party to the action. *New Orleans Canal & Banking Co. v. Montgomery,* 95 U. S. 16.

We feel that the equities preponderate in favor of the lienholders. Plaintiff seeks to estop them because (a) they should have known of the mortgage, and because (b) the record, by misdescription, was constructive notice; and for either ground they cannot now assert their lien, not having made the mortgagee a party to the foreclosure proceeding. We have shown that they made sufficient inquiry to excuse the burden of actual notice; and as for the other ground, it was the duty of plaintiff, the law charging him as against third parties with a knowledge of the state of the record and the mistake (although it was not discovered by any one until after he brought this action), to set up his mortgage by intervention in the lien foreclosure. To hold otherwise would be to excuse him and put the burden of his error upon innocent lienholders for value. It goes without saying that, had plaintiff or his attorney known of the misdescription, he would have saved this lawsuit by an intervention.

If not preponderating, the equities are at least equal, and, in such cases, the one first in error should be the first to answer for his oversight.

Plaintiff urges further that it is conceded that Patton's addition to the town of Lebam did not have any block D, and that the town of Lebam did have a block D, and that this was sufficient to put Leudinghaus Broth-

ers on notice of the fact that there was a mistake and that the property actually intended to be charged was in block D of the town of Lebam. This might be so if Leudinghaus Brothers or their attorneys had actually seen or known of the record, but no cases are cited, nor do we think any will be found, that would charge one who is searching the records to a comparison of the blocks and lots in an addition either with the lots and blocks in an original town plat or with other additions. It is enough if the searcher finds the record covering the particular property in which he is interested.

Affirmed.

MAIN, C. J., MOUNT, MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 14454. Department One. September 10, 1918.]

M. H. EGGLESTON, *Appellant*, v. ALEX. PANTAGES *et al.*, *Respondents*.[1]

CONTRACTS — ILLEGALITY — PUBLIC POLICY — INTERFERENCE WITH JUSTICE. A contract for the dismissal of a stockholder's action for the appointment of a receiver is void as against public policy, where it provided that, in consideration of a certain sum to be paid plaintiff, the action was to be dismissed, the papers not filed, and no information of it given to any person, the president having a prospective purchaser for the corporation, and other creditors benefited by the suit being deprived of their remedy to the advantage of the plaintiff.

Appeal from a judgment of the superior court for King county, Jurey, J., entered May 25, 1917, upon sustaining a demurrer to the complaint, dismissing an action on contract. Affirmed.

S. Edelstein and *A. C. Shaw*, for appellant.

Ryan & Desmond, for respondents.

[1]Reported in 175 Pac. 34.

MAIN, C. J.—The purpose of this action was to recover the sum of $2,189, alleged to be due upon a written contract. To the first amended complaint, which will be referred to as the complaint, the defendants interposed a demurrer, which was sustained by the trial court. The plaintiff refused to plead further and elected to stand upon the complaint. Judgment was entered dismissing the action. The plaintiff appeals.

The facts stated in the complaint, necessary to the presentation of the question involved, may be summarized as follows:

During the month of May, 1907, the respondents, Alex. Pantages and wife, together with others, organized the Pantages Amusement Company, a corporation capitalized at $75,000, divided into 750 shares of the par value of $100 per share. Thereafter, and prior to December 11, 1911, the appellant and others became stockholders in the corporation. Alex. Pantages, who was the majority stockholder in the corporation, was engaged in the business of operating and conducting a circuit of vaudeville theaters in many of the cities of the United States and in British Columbia. After the Pantages Amusement Company was organized, it acquired a theater in Spokane which was operated as a part of the Pantages circuit. For a time the amusement company was operated at a profit, Pantages being the president thereof. On December 11, 1911, the appellant here, as a stockholder of the amusement company, commenced an action by the service of summons and complaint against it in which it was alleged that the amusement company had been mismanaged and was in imminent danger of becoming insolvent. The debts of the company at this time were approximately $15,000. That action was for the purpose of having a receiver appointed for the corporation to take charge of and wind up its affairs. On December 13, 1911, and

before the summons and complaint which had previously been served upon the amusement company were filed with the clerk of the superior court, the appellant and Pantages entered into a written contract, which is the basis of this action. This contract recites, that the party of the first part (appellant Eggleston) had instituted an action in which a receiver was sought; that the second party (Alex. Pantages) was interested as a stockholder in the corporation and had the management of a corporation known as the Pantages Circuit of Vaudeville Theaters, in connection with which the theater of the amusement company was operated; that it was desirable and beneficial to the parties to the contract that the action be dismissed. The contract then provided:

"Now, therefore, for and in consideration of the covenants and conditions herein and the further consideration that said action will be dismissed and the complaint herein will not be filed with the clerk of the court in which said action has been instituted, and no information will be given in reference to the commencement of said action to any person.

"It is hereby stipulated and agreed: That, on or before six months from date hereof, party of the second part will pay to party of the first part, the sum of twenty-one hundred and eight-nine ($2,189) dollars. It is further stipulated and agreed that, in the event of the reorganization or sale of the circuit of theaters operated by the said Pantages Circuit of Vaudeville Theaters prior to the expiration of said six months, that then and in that event the aforesaid sum shall be immediately paid by the party of the second part to the party of the first part.

"In witness whereof, the parties hereto have hereunto set their hands and seals this 13th day of December, 1911.

"M. H. Eggleston, party of the first part.

"Alex. Pantages, party of the second part.

"It is further stipulated and agreed that in the event E. Clarke Walker, C. H. Rodenbach or Mrs. Thomas G.

Thompson or their assigns, who are owners of certain shares of stock of the Pantages Amusement Company, should, prior to the termination of this agreement, commence an action for the appointment of a receiver of the Pantages Amusement Company or for the adjudicating it a bankrupt, then party of the second part shall be relieved from the obligations under this contract and said contract shall be null and void.

"M. H. Eggleston,
"Alex. Pantages."

It will be observed that, under this contract, the action was to be dismissed and the complaint and summons were not to be filed with the clerk of the court in which the action had been instituted, and that no information would be given in reference to the commencement of the action "to any person," in consideration for which Pantages agreed to pay Eggleston the sum of $2,189 on or before six months from the date thereof. The contract provided further that, if any of the other stockholders, or their assigns, of the amusement company should, prior to the termination of the agreement, begin an action for the appointment of a receiver or other adjudication in bankruptcy, then the party of the second part (Pantages) should be relieved from the obligations of the contract.

It is further alleged in the complaint that, in conformity with the contract, the action for the appointment of a receiver was dismissed without the summons or complaint having been filed, and that Eggleston "gave no information in reference to the commencement of said action to any person."

It is also alleged that none of the other stockholders instituted an action for the appointment of a receiver within the time specified in the contract, and that they (the other stockholders) knew of the financial condition of the company at the time the action for appointment

of receiver was instituted, but declined to bring the action.

Whether this action can be maintained depends upon the question as to whether the contract above referred to was against public policy. It is well settled that agreements against public policy and sound morals will not be enforced by the courts. It is a general rule that all agreements relating to proceedings in courts which may involve anything inconsistent with full and impartial course of justice therein are void though not open to the actual charge of corruption. This is true regardless of the good faith or intent of the parties at the time the contract was entered into, or the fact that no evil resulted by or through the contract. *Delbridge v. Beach,* 66 Wash. 416, 119 Pac. 856; 6 R. C. L., p. 751.

The facts pleaded in the present case show that appellant here had instituted an action for the appointment of a receiver, had invoked the process of the court, had duly served the summons and copy of the complaint. After this was done, the agreement was entered into which provided for the dismissal of the action and the withholding of the summons and complaint from filing. The legal effect of the action for appointment of receiver was to invoke the aid of the court, not only to protect the rights of the plaintiff, but to protect the rights of all other parties, including the creditors of the corporation, who had a right to come into the receivership proceeding. Where a party seeks to use the remedy given him by law for his own benefit, as well as that of others, he is required to proceed with the utmost fairness and with due regard to the rights of all parties concerned. He will not be permitted to use the process of the court to compel a debtor to secure his claim or suffer disastrous consequences of being thrown into bankruptcy, and contract, when his own claim has been secured, to dismiss the

proceedings to the detriment of other creditors whose rights would be protected in the receivership proceedings.

In *Paton v. Stewart*, 78 Ill. 481, the action was upon a promissory note, the payment of which by the principals thereon had been guaranteed by the defendant. The principals upon the note were indebted to the plaintiff and others in large sums of money, and on petition of the plaintiffs a rule was issued out of the United States district court that they should show cause why they should not be adjudicated bankrupts. While this rule was in force and before any answer had been made thereto, and without the concurrence or consent of any of the other creditors, it was agreed between the plaintiffs and principals on the note that the plaintiffs would not further prosecute the rule in bankruptcy, but would abandon that proceeding, and, in consideration of the plaintiffs' agreement in that behalf, the note was executed by the principals and the defendant guaranteed its payment. It was there held that there could be no recovery on the note because it was a contract inhibited by sound public policy. The court used this language:

"A creditor who seeks to use the remedy given by the law, for his own benefit as well as other creditors, should be required to proceed with the utmost fairness, and with a due regard to the rights of all parties concerned, including the debtor himself. He ought not to be permitted to use this extraordinary power to compel the debtor to secure his claim or suffer the disastrous consequences of being thrown into bankruptcy, and contract, when his own claim has been secured, to dismiss the proceedings, to the detriment of other creditors. This is what is called an abuse of the process of the law, and all contracts thus obtained are illegal and void, as being inhibited by a sound public policy, even between the debtor and the composition creditor, as well as to other creditors."

From the facts stated in the complaint and in the contract, it is reasonably inferable that Pantages, at the time the receivership action was instituted, had a prospective purchaser for his circuit of vaudeville theaters, and at least one reason why he did not want the complaint and summons filed and provided in the contract that no information in reference to the commencement of the action should be given "to any person," was the effect that knowledge of the action might have upon a prospective purchaser. The appellant bound himself by the terms of the contract to give no information in reference to the commencement of the action to any person, thereby sealing his lips against the disclosure of the true facts to any one rightly seeking information as to the condition of the company.

In *Douglas State Bank v. Lewinsohn,* 192 Ill. App. 364, the plaintiff brought an action on a promissory note. The defendant pleaded a set-off in the sum of $2,000. This $2,000 was alleged to be due from the plaintiff to the defendant because the plaintiff had promised to pay the defendant that sum for temporarily depositing the sum of $15,000 or more with the plaintiff bank so as to show a substantial increase in its business in order to effect a sale to, or consolidation with, another bank. It was held that,

"The contract, if there was such a contract, between the plaintiff and defendant was an immoral one for the deception and defrauding of a third person, and no right to the compensation accrued to the defendant under it which courts will enforce."

We think the contract upon which the action in the case now before us was based is against public policy and sound morals, and was, therefore, void and unenforceable. It may be true that the objection that the contract is illegal and void as against public policy comes with poor grace from one who was a party

thereto. Such objection, however, will not be allowed to prevail even when put forward by one who participated in the wrong, not as a protection to him, but for the sake of the public good and because the law will not lend its aid to enforce an illegal contract. In such cases, the law leaves the parties where they place themselves. *Dieckmann v. Robyn,* 162 Mo. App. 67, 141 S. W. 717.

The judgment will be affirmed.

FULLERTON and PARKER, JJ., concur.

[No. 14657. Department Two. September 10, 1918.]

D. C. HOFFMAN, *Respondent,* v. J. M. SCHNATTERLY, *Appellant.*[1]

PLEADING—REPLY—AMENDMENT—DISCRETION. It is discretionary, under Rem. Code, § 303, to permit amendment of the reply after the first trial of the case.

APPEAL—REVIEW—HARMLESS ERROR. Whether a case was regularly set for trial is immaterial where the party had notice and appeared with his counsel and witnesses and had a trial.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered July 3, 1917, upon findings in favor of the plaintiff, in an action on a promissory note, tried to the court. Affirmed.

Plummer & Lavin, for appellant.

L. K. Deller, for respondent.

MOUNT, J.—This action was brought upon a promissory note. After issues were joined, the case was tried to the court without a jury. The court thereupon took the case under advisement, and, while he was considering it, the plaintiff filed a motion for leave to amend

[1]Reported in 175 Pac. 30.

the reply. This motion was granted, and the case was afterwards assigned for retrial. The defendant's attorneys did not appear at the time for the retrial and a default judgment was entered. Afterwards this default, by consent of the court and all the parties, was set aside and the case reset for trial. Defendant moved to vacate the setting upon the ground that the case was not set for trial in accordance with the rules of the court. This motion was denied and the case was retried, and resulted in findings of fact and judgment in favor of the plaintiff. The defendant has appealed.

He argues, first, that the court erred in permitting an amendment of the reply after the first trial of the case. The amendment of the reply was a matter entirely within the discretion of the trial court. Rem. Code, § 303. It is not claimed that this discretion was abused.

Appellant next argues that the case was not regularly noted to be set for trial in accordance with the rules of court. Whether it was regularly noted or not is entirely immaterial. The appellant had notice of the time and place of the trial. He appeared with his counsel and his witnesses and a trial was had. There is no showing that any prejudice resulted by reason of the fact that the case was not regularly noted to be set for trial.

The two points above considered are the only points made by the appellant in his brief. It is plain that no prejudicial error was committed by the trial court upon either of these points.

The judgment is therefore affirmed.

MAIN, C. J., CHADWICK, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14750. Department Two. September 10, 1918.]

OLIVE COMPANY, *Appellant*, v. S. V. MEEK, *Respondent*, MAIN STREET GARAGE COMPANY, *Defendant*.[1]

HUSBAND AND WIFE—COMMUNITY PERSONALTY—LIABILITY FOR SEPARATE DEBTS. Under Rem. Code, § 5917, giving the husband management and control of the community personal property, with like power of disposition as of his separate property, the community personalty cannot be levied upon to satisfy the separate debt of the husband.

APPEAL—DECISION—STARE DECISIS. The principle of *stare decisis* will not be invoked when to do so perpetuates injustice and impairs statutory rights of property.

Cross-appeals from a judgment of the superior court for Spokane county, Blake, J., entered December 13, 1917, upon findings in favor of the defendants, dismissing proceedings supplemental to execution, tried to the court. Affirmed.

Allen, Winston & Allen, for appellant.

John M. Gleeson and *A. G. Gray*, for respondent and cross-appellant.

HOLCOMB, J.—Defendant Main Street Garage Company, on April 27, 1914, made and delivered its note, due October 1, 1914, which defendant Meek indorsed as an accommodation prior to the delivery. Plaintiff alleged that it relied upon the indorsement and became a *bona fide* purchaser of the note in the ordinary course of business for value. The note, not being paid, was duly protested, and an action was brought and a judgment rendered against the defendants on April 24, 1915, in the superior court for Whitman county. This judgment was affirmed on appeal. *Olive Co. v. Meek*, 91 Wash. 169, 157 Pac. 460. This is a supplemental

[1]Reported in 175 Pac. 33.

proceeding in the superior court for Spokane county by plaintiff against the garage company and defendant Meek. Meek, for a long time previous to his indorsement of the note and at the time of this proceeding, was a married man and not the owner of separate property. Neither Mrs. Meek nor the community was made a party to the action or proceedings. At the hearing, Meek testified that the community composed of himself and wife owned some $8,000 in personalty, being the proceeds acquired from the sale of community real estate and acquired after the personal judgment against defendant Meek. The trial court held that community personalty could not be taken for the separate debt of the husband, and dismissed the supplemental proceedings at plaintiff's costs.

Plaintiff, appealing, assigns that the court erred (1-2) in refusing to make conclusion of law and the order as requested by plaintiff, (3-4) in making its conclusion of law and entering an order dismissing the supplemental proceedings with costs to defendant Meek.

This presents the question whether plaintiff can levy upon or seize personal property belonging to the community composed of defendant Meek and wife, to satisfy a personal judgment rendered against defendant Meek.

Plaintiff contends that the doctrine laid down in *Powell v. Pugh,* 13 Wash. 577, 43 Pac. 879, and cases following it, is *stare decisis,* and that, upon the faith of that rule, it acquired vested rights; and further contends that *Schramm v. Steele,* 97 Wash. 309, 166 Pac. 634, is not applicable to its case for the reason that the judgment there was for a tort, while in its case contractual rights were acquired in a commercial transaction.

That part of Rem. Code, § 5917, relating to community personal property, material here, is:

"The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof."

This statute involves community property rights, and not the enforcement of individual judgments against the husband for causes without the scope of the husband's agency and management of the community property. The vested property right of the community as an entity composed of husband and wife cannot be impaired merely because the husband is made its manager and the manager has a personal judgment against him. Plaintiff now has, as he always had, the same right to proceed against the husband alone. We cannot preserve the rule in the *Powell* case, *supra,* and invoke the doctrine of *stare decisis,* when to do so would perpetuate injustice and impair statutory community rights. In *Schramm v. Steele, supra,* we quoted with approval from *Paul v. Davis,* 100 Ind. 422, 428, as follows:

"Much as we respect the principle of *stare decisis,* we cannot yield to it when to yield is to overthrow principle and do injustice. Reluctant as we are to depart from former decisions we cannot yield to them, if, in yielding, we perptuate error and sacrifice principle. We have thought it wisest to overrule outright rather than to evade, as is often done, by an attempt to distinguish where distinction there is none."

If plaintiff acted and relied upon the *Powell* case as claimed, it certainly must be presumed that it also acted and relied on *McGregor v. Johnson,* 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022; *Milne v. Kane,* 64 Wash. 254, 116 Pac. 659, Ann. Cas. 1913A 318, 36

L. R. A. (N. S.) 88; and *Woste v. Rugge,* 68 Wash. 90, 122 Pac. 988, which discredit the principle of the *Powell* case and were decided prior to plaintiff's acquisition of any right in the note and indorsement.

The doctrine of *respondeat superior* cannot be applied to acts of the husband when such acts are without the scope of his authority. *Day v. Henry,* 81 Wash. 61, 142 Pac. 439. To hold otherwise would in effect nullify the community property law. There is no distinction between vested rights in either community real or personal property, except that the husband is made the manager of the community personal property for the community.

Since we have decided to affirm the trial court in dismissing the supplemental proceedings, it becomes unnecessary to consider defendant Meek's appeal, for the affirmance of this order will *ipso facto* dissolve the injunction.

Affirmed.

MAIN, C. J., CHADWICK, MOUNT, and MACKINTOSH, JJ., concur.

[No. 14311. Department One. September 10, 1918.]

GEORGE W. TRAHEY *et al., Appellants,* v. WALTER B. ALLEN *et al., Respondents,* JAMES W. CARR, *Intervener.*[1]

APPEAL—DECISION—LIMITATIONS—EXTENSION. Where, on appeal from a judgment conditionally quieting title, the time therein limited to appellant for making payments due expired before the hearing, affirmance will be with the allowance of thirty days for making the payments.

Appeals from a judgment of the superior court for Kitsap county, Frater, J., entered December 30, 1916, in favor of the defendants, in an action to quiet title, tried to the court. Affirmed.

Vince H. Faben, for appellants.
Walter B. Allen, in propria persona.
James B. Metcalfe, for respondents Deaver.
Jas. W. Carr, for intervener.

MAIN, C. J.—The plaintiffs brought this action for the purpose of quieting title to three certain lots in the city of Bremerton. The defendants Walter B. Allen and wife answered, claiming that the contract under which the plaintiffs were in possession of the property had been forfeited, and praying that the action be dismissed and that they be declared to be entitled to the possession of the property. James W. Carr intervened, claiming title through an execution sale. The other defendants are not before this court, and no reference need here be made to them.

The trial resulted in a judgment establishing the title of Allen and wife, subject to the right of the plain-

[1]Reported in 175 Pac. 30.

tiffs under their contract of purchase, provided they should, within six months after the entry of the judgment, pay the amount due on the contract at that time. The title of Allen and wife was quieted as against the claim of the intervener. From this judgment, the plaintiffs and the intervener appeal.

The facts necessary to an understanding of the question involved may be summarized as follows: On July 31, 1909, Trahey and wife contracted to purchase from James Deaver and wife lots 6, 7 and 8, in block 2, of Coder's addition to the city of Bremerton. The payments upon this contract were to extend over a number of years. Immediately after the execution of the contract, Trahey and wife went into possession of the property. On April 3, 1910, Deaver and wife transferred the property, subject to the contract, to E. J. Brandt, who, on May 14, 1910, conveyed it to Allen. The deed from the Deavers to Brandt was filed for record on May 17, 1910. The deed from Brandt and wife to Allen was filed for record on May 28, 1910. On the last mentioned date, a judgment was entered against Deaver, in an action brought against him by one W. H. Gilkes, for the sum, including costs, of $1,207.90. Subsequent to the entry of the judgment, the property was sold on execution for the sum of $100, and it is to this sale that the intervener traces the title which he claims.

As we view it, the controlling question in the case is whether the title of Mr. Allen is tainted with fraud. If it is not, the judgment should be affirmed; if it is, the judgment cannot be sustained. The trial court apparently entertained the view that the evidence failed to establish the charge of fraud. We have read the record with care, and entertain the same view.

From the facts stated, it appears that the conveyance to Mr. Brandt and, in turn, the conveyance to Allen

were both prior to the date of the entry of the judgment, and since the evidence does not show any fraud in the transaction, the judgment confirming the title of the defendants Allen, subject to the rights of Trahey and wife under their contract, was properly entered.

This judgment contained a provision that Trahey and wife should have six months after the entry thereof in which to meet all payments due up to that time, and if they failed in this, that the title to Allen and wife would be quieted as against them. Since there has been an appeal and the six months specified has long since gone by, it will be directed that Trahey and wife may have thirty days after the remittitur from this court is filed in the superior court in which to make all payments due and unpaid on the contract up to the expiration of such thirty days. In all other respects the judgment will be affirmed.

FULLERTON and PARKER, JJ., concur.

[No. 14427. Department Two. September 16, 1918.]

CHARLES F. RICH, *Respondent*, v. JOHN RYAN *et al.*, *Appellants*.[1]

WITNESSES—CROSS-EXAMINATION—SCOPE. In an action for a balance due for piling cut from plaintiff's land, in which plaintiff, on direct examination, testified as to the number of piles in a certain raft, but on cross-examination testified that part of them came from other land than his, it is proper to ask whether he knew how many piles came from other land; since it is a matter of right to cross-examine as to facts in issue testified to by a witness.

LOGS AND LOGGING—SALES—ACTION FOR PRICE—EVIDENCE—MATERIALTY. In an action on a contract to pay a specified sum for all piles cut and removed, testimony as to the number of piles cut which were rejected as culls is immaterial, there being nothing in the contract requiring them to pass inspection.

SAME. In such a case, when timber was cut and removed as piling, it was to be paid for, and the meaning of the word "piles" is immaterial.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered January 24, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

A. S. Ryland (*Jay C. Allen*, of counsel), for appellants.

MAIN, C. J.—The purpose of this action was to recover the balance claimed to be due on a written contract for piles cut and removed from the plaintiff's land. The defendants denied liability and plead affirmatively that all the piles cut and removed had been paid for. The affirmative matter in the answer was denied by a reply. The cause was tried to a jury, and resulted in a verdict in favor of the plaintiff in the sum of $224.37. Motion for new trial being made and

[1]Reported in 175 Pac. 32.

overruled, judgment was entered upon the verdict, from which the defendants appeal.

The facts are briefly these: On the 5th day of December, 1912, the respondent, by written contract, sold to the appellants the timber then standing upon certain described land. The only paragraph here material is the following:

"The party of the second part (the appellants) has agreed to pay to party of the first part (the respondent) the sum of one dollar and fifty cents ($1.50) per thousand feet, 'for logs,' and one and one-half cent (1½c) per running foot, 'for piling,' for the right to cut and remove the timber from the above described land within one (1) year from date of this agreement."

It will be noted that this paragraph of the contract provides for the payment of the timber as logs and also as piling. There is no controversy about the portion of the timber that was cut and removed and which was to be paid for at the rate specified for logs. There were cut and removed three rafts of piling, about the first two of which there is no controversy. This litigation arises over the third raft. In this raft there were something over 600 piles. Of these the appellants paid for approximately 400 at the rate specified in the written contract, but declined to pay for the balance because, when the raft was towed to Seattle, those not paid for would not pass the inspection as piles and were discarded as culls. There is also a claim that some of the piles were cut and removed from land adjacent to the land described in the contract but owned by other parties.

On direct examination the respondent testified that there were in the raft over which the controversy arises 654 piles and that a certain number had been paid for, and inferentially testified that all the piles in this raft

were removed from the land described in the contract. On cross-examination the following occurred:

"By Mr. Ryland: Q. Were all these logs you say were taken from your land made into one raft? A. The piling was made into one raft, yes. Q. Were there, to your knowledge, any other piling included in this raft? A. Yes, sir. Q. Where did that piling come from? A. It came from Mr. Worthington's. Q. So you know, included in this raft, there were some from his land? A. Yes, sir. Q. Do you know about how many piles included in this raft or boom were cut from Mr. Worthington's land? By Mr. Kohlhase: We object to that as not proper cross-examination. Objection sustained, exception allowed defendant."

One of the assignments of error is based upon the ruling of the court in sustaining the objection to the cross-examination as to the number of piles in the raft that was taken from Worthington's land. From the excerpt above quoted from the testimony, it appears that the witness had testified that there was piling in this raft that came from the land owned by Worthington. The inquiry directed to the number of these piling was the one to which the trial court sustained the objection. Respondent had no right to recover for any piling cut from Worthington's land. It is, of course, a general rule that the scope of cross-examination rests largely in the discretion of the trial court, but where such cross-examination of a witness relates to facts in issue, or facts relative to the issue and about which the witness being cross-examined has testified, it may be pursued as a matter of right. Jones, Evidence (2d ed.), § 821. One of the facts in issue was the number of piles in the raft for which the respondent had a right to recover. He had testified in his examination in chief that there was a certain number of piles in the raft, and inferentially that these

piles were all taken from the land described in the contract. On cross-examination, without objection, he testified that some of the piling came from Worthington's land. When inquiry was directed to the number of these piling, the objection thereto was sustained. We think the court erred in sustaining this objection, and that such ruling requires a reversal of the judgment.

Upon the trial the appellants offered testimony as to the number of "rejected timbers" or culls that could not be disposed of as piles when they reached their destination. This was refused, but there was no error in this ruling. The contract provided that defendants should pay a specified sum for piling cut and removed from the land described therein. There is no provision in the contract that such piling cut and removed should not be considered as such if they failed to pass inspection or could not be disposed of as piles. The general rule of law for which the appellants contend on this point, to the effect that any evidence that tends to disprove any allegation of the complaint may be proved under a general denial, can be admitted, but it is not applicable to the facts here presented. When the timber was cut and removed as piles the liability under the contract became fixed.

It is also claimed that the court erred in excluding testimony as to the meaning and use of the word "pile," but this contention is without merit. As already stated, under the contract, when the timber was cut and removed as piling, it became such as between the parties.

Finally, it is contended that the court erred in refusing to give an instruction relating to culls, requested by the appellants. If the testimony as to culls was properly rejected, as we have found, it would follow

that the requested instruction was likewise properly refused.

The judgment will be reversed, and the cause remanded with direction to the superior court to grant a new trial.

MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14440. Department One. September 16, 1918.]

THE CITY OF MARCUS, *Appellant*, v. SAMUEL OFNER *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—WARRANTS—NEGOTIABILITY. Municipal improvement district warrants are negotiable for all purposes of title, so that an attorney in lawful possession could pass good title to bona fide pledgees as security for a loan to him, although he had no authority to dispose of them.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 30, 1916, upon the verdict of a jury rendered in favor of the defendants by direction of the court, in an action in replevin. Affirmed.

L. B. Donley (*L. C. Jesseph*, of counsel), for appellant.

F. A. McMaster, for respondents.

MAIN, C. J.—Plaintiff, a city of the fourth class, brought this action to recover the possession of certain improvement district warrants. The trial resulted in a judgment for the defendants, and the plaintiff appeals.

Briefly, the facts are: Certain improvement district warrants, all of which read "Pay to the order of," issued by appellant in 1911, were presented by

[1]Reported in 175 Pac. 31.

the payees to the city treasurer, who indorsed them "Not paid for lack of funds." The warrants were indorsed in blank by the payees and later transferred to the First State Bank of Marcus, and by the bank deposited with the city treasurer as indemnity against loss of city funds deposited in the bank. The bank failed, whereupon the city employed two attorneys, one of whom was W. C. Stayt, to recover from the bank, ex-city treasurer and his bondsmen the amount due the city. The city delivered to Stayt the warrants for use during the trial. While in his possession, and before trial was had, he pledged the warrants (which bore only blank indorsement of payees) to defendants herein as security for loans made by them to him.

The sole question for determination is whether the respondents, having acquired the warrants in good faith as security for the loans from one having rightful possession of them, had a superior title thereto to that of the appellant.

There is no substantial distinction between this case and the case of *Fidelity Trust Co. v. Palmer,* 22 Wash. 473, 61 Pac. 158, 59 Am. St. 953. In that case the plaintiff sued to recover the value of a city warrant which had been delivered to an attorney to be used as evidence in a case then pending in the superior court. The attorney, instead of returning the same to his principal, sold it to the defendant, who paid value therefor. At the conclusion of the evidence in that case for the plaintiff, the trial court, upon defendant's motion, directed a judgment in his favor. The purchaser there, as here, acquired the warrant in good faith and for a valuable consideration. It was there said:

"Appellant contends that such a warrant is not a negotiable instrument, but is intended as a mere voucher of the city treasurer when paid. The great

weight of authority is that a county or city warrant possesses all of the qualities of negotiable paper but one, viz., that it is open to any defense which might have been made to the claim upon which it is founded. For all purposes involving its title, it must be treated as negotiable. (Citing cases.) Such being its character, the case is not affected by the fact that Stevens (the attorney) had no authority to sell the warrant."

Upon the authority of that case, the judgment in this case will be affirmed.

FULLERTON and PARKER, JJ., concur.

[No. 14540. *En Banc.* September 16, 1918.]

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, *Appellant,* v. BOARD OF COMMISSIONERS OF YAKIMA COUNTY *et al., Respondents.*[1]

CONSTITUTIONAL LAW—DUE PROCESS—SPECIAL ASSESSMENTS—REVIEW BY COURTS—NECESSITY. The drainage district law, Rem. Code, §§ 4226-1 to 4226-41, does not violate the due process clauses of the state and Federal constitutions, in that it provides for special assessment without the medium of any review by the courts; due process being afforded when there is opportunity to be heard before the body which is to make the assessment.

DRAINS — ASSESSMENT — BENEFITS. An assessment for a drain against railroad right of way cannot be sustained in a sum greater than that upon other property on the theory that, by drying up the country and protecting it from floods, it makes the roads in the vicinity more accessible and adds to the business of the railroad; since that is a general and not a special benefit, and a greater burden on one property than upon others requires some different or special benefit to such property.

SAME—ASSESSMENT—BENEFITS. An arbitrary drainage assessment of a railroad right of way in a disproportionate sum cannot be sustained because the property was benefited to the extent of the assessment, which was to be apportioned ratably and equitably.

FULLERTON, J., dissents.

[1]Reported in 175 Pac. 37.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered February 16, 1917, dismissing an action to restrain the collection of an assessment, after a trial on the merits. Reversed.

A. C. Spencer, Richards & Fontaine, and *Hamblen & Gilbert,* for appellant.

W. B. Bridgman, for respondents.

CHADWICK, J.—In the year 1915, the county commissioners of Yakima county, pursuant to the provisions of the statute of 1913 (Laws of 1913, p. 611, ch. 176; Rem. Code, §§ 4226-1 to 4226-41), established a drainage district in that county, known as subdistrict No. 4 of drainage improvement district No. 3. The subdistrict comprised approximately 8,000 acres, and included a portion of the right of way and the improvements thereon of the appellant railway company. The right of way so included is some four miles in length and amounts in area to 53.1 acres. The district was organized for the purpose of constructing on the assessment plan a drainage ditch and certain laterals, made necessary to take care of the seepage waters escaping from agricultural lands irrigated from the Sunnyside canal and the drainage from a hilly area lying north of the district. The ditch as constructed cost $15,415.97. Of this sum, $490.35 was assessed upon the appellant's right of way as property benefited by the improvement. On the return of the assessment roll to the county commissioners, the appellant appeared before that body and protested against the assessment on the ground that it was unjust, arbitrary, made upon a fundamentally wrong basis, and constituted a taking of its property without due process of law. The commissioners overruled the objections and confirmed the

assessment, whereupon the appellants brought the present action to restrain the collection of the assessment and to remove the apparent lien thereof as a cloud upon its title. It admitted, however, that the land occupied by its right of way might be justly assessed for the sum of $112.92, which sum it tendered and paid into court for the use of the district. The trial court, after a trial upon the merits, found the assessment just and valid and dismissed the action. From the judgment of dismissal, this appeal is prosecuted.

Of the assignments of error, the first to be noticed is that the statute under which the proceedings were had violates the due process of law clauses of both the state and Federal constitutions. The contention is founded on the fact that the statute makes no provision for reviewing the legality and justness of the assessment in the ordinary courts of law. But it is not essential to the validity of an act authorizing a special assessment for benefits under this clause of either the state or Federal constitution that the act provide for an assessment through the medium of the courts, or for a review by the courts of such a proceeding when made by another body. This we held in *Bowes v. Aberdeen,* 58 Wash. 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709. In that case we said:

"Nor do we believe that appellants are in any way deprived of their property without due process of law, within the rule of *Davidson v. New Orleans,* 96 U. S. 97, and *Hagar v. Reclamation District,* 111 U. S. 701. If it be conceded that the legislative department has not the right to arbitrarily fix the amount of the tax, the act of 1909 is within that line of cases holding that, if the citizen be given an opportunity to be heard, either before the assessing body or in the courts, then the levy of such special assessments will not operate as a deprivation of rights of property without due

process of law. The act in question provides for a hearing upon the assessments levied, and that at such time the board may hear, consider and determine objections and protests, and make 'such alterations and modifications in the assessment roll as justice and equity may require.' "

The constitutionality of this very act was also before us in the recent case of *Foster v. County Comrs. of Cowlitz County,* 100 Wash. 502, 171 Pac. 539. While the precise point here urged seems not to have been raised or discussed, the sole question urged was the unconstitutionality of the act, and we upheld it, sustaining an assessment made thereunder.

That such an act is not violative of the Federal constitution for the reason urged was held by the supreme court of the United States in *Hibben v. Smith,* 191 U. S. 310. In that case Mr. Justice Peckham, speaking for the court upon the question, used this language:

"The claim set up on the part of the lot owner, that there can be no due process of law under which an assessment can be made which does not provide for a review of such assessment and a hearing by a court, is not tenable. Assuming the necessity of a hearing before an assessment can be made conclusive, the law may provide for that hearing by the body which levies the assessment, and after such hearing may make the decision of that body conclusive. Although in imposing such assessments the common council or board of trustees may be acting somewhat in a judicial character, yet the foundation of the right to assess exists in the taxing power, and it is not necessary that in imposing an assessment there shall be a hearing before a court provided by the law in order to give validity to such assessment. Due process of law is afforded where there is opportunity to be heard before the body which is to make the assessment, and the legislature of a state may provide that such hearing shall be con-

clusive so far as the Federal constitution is concerned."

The further contention is that the assessment was unjust and arbitrary and made upon a fundamentally wrong basis. Figured as acreage the assessment of appellant's right of way is about five times greater than the assessment of adjoining property. It is admitted that the land of the railroad company is the same as other land in the community, and that the commissioners had a very definite idea that out of the whole cost of the improvement appellant should pay about the sum of $500. The assessment is justified by counsel although it is questionable whether the commissioners had all that is now advanced in mind, for they frankly admit that, before proceeding to the levy, an arbitrary sum was agreed upon to be assessed against the appellant. But if an assessment can be sustained in reason, we take it that it will not be rejected for this account. It is now said that the commissioners found that the drainage tended to lower the general water level in the drainage district and in the vicinity of appellant's road, thus contributing to the solidity and safety of the roadbed and the effective life of the ties, thus lessening the cost of maintenance; that it protected the road in a material degree from damage by floods and high water which were likely to occur; that it dried up and made passable the county roads in the vicinity of appellant's line, thus making it more accessible to the patrons of its road; and that it reclaimed much agricultural land in the vicinity of the road which but for the drainage would have remained fallow, thus contributing to the benefit of the road by an increase of its business.

But these reasons are not enough to sustain an assessment of the property of the appellant over that of

other lands and other business within the limits of the district. While we recognize that some property may be benefited to a greater extent than other property, the benefit must be sustained upon reasonable grounds. Some of the reasons urged for sustaining the greater assessment of appellant's property may be called special benefits, while others are as clearly general benefits. One of the things urged as a special benefit is that the drainage will contribute to the solidity and safety of the road and add to the life of the ties and lessen the cost of maintenance; but if the commission has acted upon that assumption it is hardly borne out by the record, for the road is upon a grade elevated above the surface of the surrounding country, has been in no way impaired by existing conditions, and the greater preponderance of the testimony is that there has been no extra expense of maintenance by reason of the need of drainage to the adjacent agricultural lands which have been alkalied by reason of the raising of the water table in that vicinity. In the light of the testimony, this condition ceases to be a reason and becomes only an unsustained theory. That the drainage would protect the road in a material degree from damage by floods and high water is called a special benefit, but this a benefit common to all the property in the district. We may grant that an assessment should be sustained upon this benefit, but it does not follow that it should be laid with heavier hand upon appellant's property than upon other property.

The other reason urged, that the drainage will dry up and make the country roads in the vicinity more accessible so that the patrons of appellant's road may more conveniently patronize it, is a general and not a special benefit, for, if the drainage will make the roads more accessible so that business will follow, it will make the roads more available to the patrons of the

road and make it possible for them to haul their products more cheaply and conveniently than they would be able to do if the work were left undone. To adopt the theory that the reclamation of land which had been rendered useless by the elevation of the water table would increase the business of appellant would be to ignore entirely the fact that the very same benefit would come to the adjoining lands, for if the country in its present condition does not furnish traffic for the road and will with the drainage afford traffic, how can it be said that this item is special to the appellant when the thing that is done to make that traffic is of the same benefit to the landowner. Without it the land owner can raise no crops, his land is valueless, and with it, under this assessment by the expenditure of less than $2 an acre, his land is made productive and of great value. As the road would get more tonnage by reason of the improvement, the landowner would get more yield per acre. If the appellant will draw two tons of freight from the adjoining land where it drew none before, so will the landowner raise two blades of grass where he raised none before. Their situation is identically the same, the return of one being in crops, and the other in freight for moving the crops. When the day's work of each of them is done and they meet to deposit their money they are upon exactly the same footing. They are both engaged in a business enterprise, and there is no statute that gives one an advantage over the other because of his calling. We think, therefore, that the only special benefits are as noted, and that they are the same in kind as the special benefits occurring to other property.

Respondent relies upon *In re Westlake Avenue,* 40 Wash. 144, 82 Pac. 279, and *Vancouver v. Corporation of the Catholic Bishop of Nisqually,* 90 Wash. 319, 156 Pac. 383, and other cases, but the difficulty in applying

them is that the argument is as applicable under the facts of this case to the situation of the adjoining lands as it is to the situation of appellant's right of way.

It cannot be denied that there is a benefit to all of the property that will sustain an assessment, but, if the district would put a greater burden upon one property over another, it must disclose some benefit different in character and special to the property which is made subject to the greater burden.

The contention of counsel is fairly met in *In re Harvard Avenue North,* 47 Wash. 535, 92 Pac. 410, where it is suggested that a convenience or benefit to a street railway company by the improvement of a street may nevertheless be considered as an element of special benefit to the neighboring property. Or to put it in another way, where the benefit is like in kind and mutual, the charge should be about the same to each owner.

The case of *Chicago, R. I. & P. R. Co. v. Wright County Drainage District,* 175 Iowa 417, 154 N. W. 888, if casually read would seem to sustain the judgment. But in that case, aside from contending that there was no benefit at all, a contention which is not available to appellant under its tender, the company maintained that the assessment was disproportionate when figured on an acreage basis. The court rightly held upon the case before it that the assessment need not necessarily be laid upon an acreage basis, and upon the facts, that the company had received a special benefit in the very things that respondent here asserts. We may confidently assume that the testimony was sufficient to sustain the finding. We hold, as was there held, that the burden is on the appellant to show a want of special benefit, but this burden was assumed and the testimony clearly preponderates, if, indeed, it can be said that there is any evidence to the contrary, that there will

not be a greater convenience or economy of maintenance, or that the life of the ties will be lengthened, or that there will be greater solidity or safety to the road. Commissioners are free to take all such things into consideration if they be proven or are evident facts, but they are not privileged to sustain the levy of an arbitrary amount because in some cases they may occur.

Counsel seems to argue that appellant should not complain for, under the testimony, it is clear that it is benefited to the extent of the assessment, but this is unsound. It may be granted that it is so, or that it may be benefited to an even greater sum, but assessments are not to be disproportionately laid, for the law will not tolerate the thought that the whole or even an unequal proportion of an assessment shall be laid against particular property because it may be benefited to the extent of the assessment. The cost is to be apportioned ratably and equitably between the landowners, and before an assessment can be sustained upon a particular piece of land the burden is upon the courts, when called upon to review it, to inquire whether other lands have been assessed in like proportion for the same benefit.

We are convinced that the assessment was made upon a fundamentally wrong basis, that it is disproportionate to the assessment laid upon other property in the district, and that it cannot be sustained. We understand that the district is not without remedy by reassessment.

Reversed, and remanded with directions to enter a judgment in favor of appellant.

MAIN, C. J., MOUNT, MITCHELL, PARKER, HOLCOMB, MACKINTOSH, and TOLMAN, JJ., concur.

FULLERTON, J., dissents.

[No. 14711. Department Two. September 16, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. ROBERT A. HOOD, *alias F. P. Eastman*, *Appellant*.[1]

WITNESSES—IMPEACHMENT — COLLATERAL MATTER — CREDIBILITY—CORROBORATION. In a prosecution for murder, in which the whereabouts of a certain witness at a certain time was material and in direct conflict, the witness having denied upon cross-examination that she had then gone to her barber shop and had been spoken to by a policeman, her impeachment by the policeman in rebuttal is not upon a collateral matter and is proper upon the issuable circumstance and her credibility, and to sustain the credibility of witnesses contradicting her.

CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—MATERIALITY. In a prosecution for murder, newly discovered evidence that an accessory had inquired the way to accused's room at 3 o'clock on the morning of the murder, did not go to an issue of fact and is not ground for a new trial, where both the accessory and accused and another witness testified that he called at the room two hours earlier.

SAME—APPEAL—MISCONDUCT OF COUNSEL. Error cannot be assigned upon improper argument of counsel where no objection was made at the time or opportunity given the court to correct the error.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered March 28, 1917, upon a trial and conviction of murder. Affirmed.

Crandell, Williams & Crandell, for appellant.

John B. White, for respondent.

CHADWICK, J.—Appellant was convicted of the murder of one Margaret Braun. The murder occurred on Sunday night, November 11, 1916. At the time the woman was murdered, certain of her property was carried away in two suitcases. The principal witness for the state was James Weston, who, by his confes-

[1]Reported in 175 Pac. 27.

sion, makes himself an accessory to the crime. His testimony is that, after the murder, the suitcases were carried by appellant and himself to the appellant's room in the Granite block. The appellant, who at the time and for some time prior thereto had been living with a woman by the name of Vivian Tozier, testified that, after they had gone to the room of the appellant, they examined the property and that the Tozier woman said that the plunder was worthless and insisted that the suitcases be removed from the rooms; that Weston took one of the suitcases and left it in a cafe, the other being removed on the next night by the Tozier woman, who left it in a stairway near the Tourist hotel, where the murder was committed.

The appellant and the woman testified that she was not out of the apartments occupied by them between Sunday afternoon and the following Wednesday morning. This made a direct conflict in the testimony between the appellant and the woman on the one side and Weston on the other. She was asked on cross-examination if, as a matter of fact, she was not at her barber shop at the hour of 1:15 on Monday morning, November 12, where she remained five minutes or more, and that, either in going or returning therefrom, she had not been spoken to by a police officer by the name of Whalen. She denied that this was so. The police officer was called in rebuttal. He testified that he saw her on Monday morning on the street; that he saw her go into her barber shop; that she was followed at some distance by two men; that, when they saw him, they stood over on the curb line and looked into the shop at her and looked at him; that the time was about a quarter after one o'clock; that, after she left the shop, she went past him saying: "Did you speak to me, officer, when you went by?" That he replied, "No, I did not speak to you." She said, "Well, I thought

you did." He said, "If I had of spoken to you, you would have heard me." He further testified that she then went back to the shop, but before doing so said, "There was some men wanted me to get them some booze, but I did not do it;" that she passed on down the street; that one of the men, to whom he had referred, whistled to her, then called her, and she walked across the street and talked to him for a few minutes, after which the three of them went on to the Buckley Cafe.

Counsel for appellant objected to this testimony upon the ground that it was an attempt to impeach the witness upon a collateral matter. This is the first error assigned. That a party is bound by the testimony of an adverse witness upon a collateral question is well established. *State v. Schuman,* 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A 633.

While counsel suggests the rule, they misconceive the nature and character of the testimony offered to impeach the witness. It was neither collateral nor irrelevant. It went to the subject-matter of the inquiry. The disposition of the suitcases was a material circumstance and most essential to the establishment of the identity of the murderers. If the witness had testified that she was an unmarried woman, the state would have been bound by her answer, for that fact would have been entirely collateral and irrelevant, but if she had testified that she was not in her room at the time the witness says she was there and took the suitcase away, the state could prove her presence by other witnesses, for two reasons: Her whereabouts at the time became an issuable circumstance in the chain of events, and her credibility as a witness became an issue of fact for the jury.

"An inquiry touching the capacity of a witness to give correct testimony is not collateral or irrelevant

within the meaning of the rule." 7 Ency. of Evidence, p. 86.

"A witness' acts variant from his testimony on the stand may ordinarily be shown to impeach him . . . Where a witness testifies to the ideals, conduct, acts, intent or motives of himself . . . specific acts of his at variance with his representations may be proved." Id., p. 149.

"The acts and conduct of a witness relative to the matter in controversy which are inconsistent with his testimony, likewise his motives, interest, or animus as connected with the cause, or with the parties thereto, may be proven for the purpose of weakening the force of his testimony. And for the same purpose it is proper to admit evidence of statements made by the witness relative to matters material to the issues contradictory of his testimony on the trial. As to all of these matters, if a witness denies or fails to admit the imputed act, conduct, motive, interest, animus or contradictory statement when interrogated about them on cross-examination, he may be contradicted by other testimony proving them." *Stewart v. State,* 42 Fla. 591, 28 South. 815.

In *Commonwealth v. Goodnow,* 154 Mass. 487, 28 N. E. 677, which was a prosecution for keeping intoxicating liquors with intent to unlawfully sell the same, a witness testified that he had not drunk intoxicating liquors on the premises within two years. It was held that he might be contradicted by evidence tending to show that he had been intoxicated repeatedly during that time.

In *State v. Watson,* 102 Iowa 651, 72 N. W. 283, a witness testified that he was never at a certain place in his life. The state was permitted to show that he was there on or about a particular date. The testimony was received not only for the purpose of impeaching the witness, but in rebuttal of the main issue.

In *Fitzgerald v. Williams,* 148 Mass. 462, 20 N. E. 100, the witness denied a former visitation to a house

of ill-fame. It was held competent to prove the fact as tending to contradict him.

In *De Sailly v. Morgan,* 2 Esp. 691, the witness testified that he had paid much attention to the morals as well as the education of the boys of a certain school. Lord Kenyon held that a letter written by him which contained immoral passages that were inconsistent with the duty of a preceptor was admissible.

Although it seems not to have so impressed counsel for either party to this appeal, it occurs to us that this court has held in line with these authorities. In *State v. Burton,* 27 Wash. 528, 67 Pac. 1097, the defendant testified that he had not solicited an opportunity to plead guilty to petit larceny. Two witnesses were introduced for the purpose of proving that he had made such application. The court held that "ground for impeachment had been laid upon his cross-examination and we think that the testimony was properly received, either in rebuttal or as impeaching testimony." See, also, *State v. Stone,* 66 Wash. 625, 120 Pac. 76.

The witness Vivian Tozier having testified that she had not left her rooms between Sunday afternoon and Wednesday morning, and having denied upon cross-examination that she had gone to her barber shop or that officer Whalen had spoken to her, the testimony was properly received in rebuttal to sustain the credibility of the witness Weston and to impeach the credibility of the witness Tozier. This assignment is without merit.

The next error assigned is that the appellant was convicted upon the uncorroborated testimony of the witness Weston, and that the court erred in denying a new trial on the ground of newly discovered evidence. After the trial, one Foster made affidavit that, at about three o'clock in the morning after the murder had been

committed, Weston came to his room in the Granite block and inquired the number of appellant's room and that he directed him to it. Both appellant and the Tozier woman testified that Weston had been in their rooms before. The woman had testified that he had come to their room between 12 and 1 o'clock on the night of the murder with two suitcases. Appellant testified in the same way, saying that Weston had come about 1 o'clock, that he took one suitcase away and returned about 3 or 4 o'clock in the morning. All the witnesses agreed that Weston had been in the apartments occupied by the appellant and the Tozier woman at least two hours before it is said that he inquired of Foster. The testimony offered goes to no issue of fact and, if taken as true, would not in any way indicate that the story told by the three principal parties to the transaction was not also true. If Weston's presence in appellant's apartments at an earlier hour were denied, a different question would be presented.

It is also assigned that counsel for the state was guilty of misconduct in that his argument to the jury was improper; no objection was made at the time and no opportunity given to the court to correct the error, if it be such, by admonition, discipline or by admonishing the jury. The record is made by affidavit filed subsequently. The objection is not timely and, under the rule announced by this court in *State v. Johnson, ante* p. 59, 173 Pac. 723, where former decisions are collected, it will not now be considered.

All of the other assignments of error go to the sufficiency of the evidence. It will serve no purpose to review the harrowing details of the murder or the events following it. It is enough to say that the jury was convinced beyond a reasonable doubt of the guilt of the appellant. The testimony of the state was ample, if

believed by the jury, to sustain the verdict rendered. Being thus sustained, the judgment is affirmed.

MAIN, C. J., MOUNT, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14782. Department Two. September 16, 1918.]

PUGET SOUND INTERNATIONAL RAILWAY, *Respondent*, v. THE CITY OF EVERETT, *Appellant*.[1]

MUNICIPAL CORPORATIONS—CONTRACTS FOR STREET LIGHTING—CONSTRUCTION. A city cannot have the size of its lights reduced without consent of the company, under a contract for city lighting providing that the city shall establish the location and size of the lamps and that, when a lamp shall have been once established, it shall continue during the life of the contract, except that its position may be changed, and that new improved lamps shall be approximately the same wattage and cost as the one for which it is substituted; the intention being that the revenue of the company should not be reduced.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered January 24, 1918, in favor of the plaintiff, upon sustaining a demurrer to the answer, in an action on contract. Affirmed.

Wm. A. Johnson, for appellant.

J. A. Coleman, for respondent.

HOLCOMB, J.—On April 15, 1914, the appellant and respondent's assignor entered into a contract for the furnishing of street lights by the respondent for the use of appellant during a term of five years from the date of the agreement, the material parts of which are as follows:

"Fourth.—The company agrees to furnish all the light that may be required by the city for street light-

[1]Reported in 175 Pac. 40.

ing purposes during the life of this contract, to install such lights as may be ordered by it from time to time during the life of this contract, and to operate all lights from the cessation of daylight in the evening until the coming of daylight in the morning, upon each and every night, all for the price hereinbefore in (Par. 2) set forth. The company shall furnish all lamps and lamp renewals and replace the same at its own expense and shall bear all cost of maintenance, repair and operation of service in placing the lamps and lights in position. *When a lamp shall have been once established it shall continue during the life of this contract,* except that its position may be changed upon order of the city council and at the expense of the city. . . .

"Seventh.—The council shall, by resolution, determine the location and size of all lamps to be installed hereunder and all said lamps shall remain in service during each and every month during the term of this contract, except that position and size of said lamps may be changed as hereinafter specified. . . .

"Eleventh.—The company further agrees that should a new and improved form of lamp for street lighting come into general use during the life of this contract, that it will, upon application of the city, substitute such new and improved lamp, provided, however, that such new lamp shall be approximately of the same wattage and cost as the one for which it is substituted."

On September 21, 1917, appellant gave respondent written notice of an adopted resolution directing respondent to reduce, on October 1, 1917, the size of certain of the street lights, with a schedule of the lights the size of which respondent was directed to reduce. Respondent refused to reduce the size of the lamps and, at the end of the month of October, appellant paid to the respondent the amount which would have been due had respondent reduced the size of the lamps. Respondent brought action to recover the difference between the original schedule price and that which appellant paid.

A demurrer was interposed to the answer, which raised the question of the construction of the contract. It was stipulated between the parties that if the appellant, under the terms of the contract, has the right, without the consent of the respondent, to have the size of the lights reduced, then the demurrer to the answer should be overruled and the action dismissed; but if no such right exists, then the demurrer should be sustained and judgment entered as demanded in the complaint. The demurrer having been sustained and defendant refusing to plead further, judgment was entered accordingly. The sustaining of the demurrer to the answer and entering judgment for the plaintiff is assigned as error.

The sole question involved is the construction of the contract. It is admitted that respondent's assignor prepared the contract. Appellant contends that the contract is ambiguous, and in construing it the court should resolve all ambiguities in favor of appellant, under the rules that, in case of doubt, the contract should be interpreted against the party drawing the contract, and that, when a contract is made with the public, it is ordinarily construed most favorably to the public. These rules may be conceded correct and applicable where the language of the contract as expressed leaves the intention of the parties doubtful. Ordinarily, the agreement of the parties is to be ascertained from the plain language used by them, and where the meaning of a contract is plain, another meaning cannot be added by implication. Contracts must be liberally construed so as to give them effect and to carry out the intention of the parties when read as a whole.

On reading the contract as a whole it is plain that the parties' intent as to the size of the lamps is ex-

pressed in paragraphs 4, 7, and 11 thereof. That part of paragraph 4 which is as follows:

"When a lamp shall have been once established it shall continue during the life of this contract, except that its position may be changed upon the order of the city council and at the expense of the city,"

allows the change of position of the lamp at the expense of the city, but does not allow any change in the size of the lamp. The clause in paragraph 7, "except that position and size of said lamps may be changed as hereinafter specified," plainly refers to that which follows, and on proceeding to paragraph 11, which is hereinabove stated, we find the clause relating to a new improved lamp, "provided, however, that such new lamp shall be approximately of the same wattage and cost as the one for which it is substituted." In construing the contract in its entirety, and especially paragraph 11, it is apparent that it was not intended that the revenue of respondent could be reduced, although the city may require the substitution of an improved form of lamp to be approximately of the same wattage as the old one.

Appellant discusses various phases of the public service commission law which, in view of the condition of the pleadings and stipulation between the parties, it becomes unnecessary to consider.

Having concluded that the demurrer to the answer was properly sustained and judgment entered in accord with the stipulation, the judgment is affirmed.

MAIN, C. J., MOUNT, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14463. *En Banc.* September 23, 1918.]

MATT MATSON, *Appellant,* v. KENNECOTT MINES COMPANY *et al., Respondents.*[1]

APPEARANCE—GENERAL OR SPECIAL. Under Rem. Code, § 241, providing that every appearance is general unless the defendant in making the same states that the same is a special appearance, a motion to quash service of process reciting that the defendant appears specially and for the purpose of the motion only, is a special appearance.

SAME — GENERAL OR SPECIAL — PLEADING OVER — WAIVER. Under Rem. Code, § 241, providing that every appearance is general unless the defendant in making the same states that the same is a special appearance, a special appearance on motion to quash service of process is not waived, after overruling of the motion and exceptions thereto, by answer on the merits praying for a dismissal and costs, where the special appearance was preserved in subsequent appearances and affirmative relief was not asked (overruling on rehearing, Id., 101 Wash. 12).

HOLCOMB, J., dissents.

Appeal from orders of the superior court for King county, Jurey, J., entered June 2, 1917, dismissing an action for personal injuries and denying a new trial, after a hearing before the court. Affirmed.

George H. Rummens, Wilmon Tucker, Heber McHugh, and *John T. Casey,* for appellant.

Roberts, Wilson & Skeel and *Bogle, Graves, Merritt & Bogle,* for respondents.

ON REHEARING.

TOLMAN, J.—This case was heretofore decided by departmental decision, which will be found in 101 Wash. 12, 171 Pac. 1040, and to which reference is made for a statement of the facts. Upon a rehearing *En Banc,* a majority of the court is of the opinion that

[1]Reported in 175 Pac. 181.

the former decision cannot stand, for the reasons which will hereinafter appear.

Four different attempts were made to serve the summons on the Kennecott Mines Company by the delivery thereof to four different persons thought to be its agents. By its motions to quash, the respondent challenged the sufficiency of the service upon each of such persons, which motions to quash were denied by the trial court.

After a careful examination of all of the facts relied upon to support the service, we are forced to the conclusion that this case, in all its features relating to the service of the summons, falls squarely within the rule laid down in the recent case of *Macario v. Alaska Gastineau Min. Co.*, 96 Wash. 458, 165 Pac. 73, L. R. A. 1917E 152. And as the authorities are there reviewed at length, a further discussion of them is now unnecessary.

The question, therefore, here to be determined is, Did the respondent mining company give the court jurisdiction by entering a general appearance?

Its first appearance was undoubtedly special in name and in fact, for, after setting up "appearing here specially for the purposes of this motion only, moves the court to vacate, set aside and quash the alleged or pretended service of summons and complaint upon the Kennecott Mines Company for the following reasons," and after setting forth the grounds relied upon, concludes: "Wherefore the defendant Kennecott Mines Company prays for an order of this Honorable Court vacating, quashing and annulling the said service of summons and complaint upon and against the Kennecott Mines Company." Clearly there was here no invoking of the jurisdiction of the court by asking for the rendition of a judgment or order in the case such as the court can only render when it has jurisdiction of

the persons of the parties to the action. Under our statute, Rem. Code, § 241, and under all the authorities, this constitutes a special appearance only.

Having made, then, this special appearance only, and the motion to quash having been denied, was it the duty of the respondent, in order to preserve this question for determination on appeal, to appear no further, submit to a judgment being entered against it by default, and take the chances, if the appellate court should affirm the ruling on the motion to quash, of having to pay the plaintiff's full and uncontested demand, or might it preserve the point for decision upon a future appeal, and defend on the merits with a view of reducing or defeating the plaintiff's claim?

In 4 C. J. 1365, it is said:

"In some jurisdictions it is held that, where a defendant appears specially to object to the jurisdiction, and his objection is overruled, he must elect either to stand on his objection or to go into the merits, and, if he goes into the merits of the cause, the objection is thereby waived."

To support this rule, cases are cited from fifteen states and territories. The author then proceeds:

"This rule, however, is subject to qualification, where the appearance is not voluntary, or where there is a stipulation allowing defendant to plead. But in many other jurisdictions, and by what seems the sounder reasoning, it is held that a defendant does not lose the benefit of his attack on the jurisdiction by thereafter answering and pleading to the merits, provided he preserves his objection, secures a ruling thereon, and has the ruling embodied in an exception. But even where this rule prevails, if a defendant goes further than he is necessarily required to do in order to contest the action on its merits and makes himself an actor in the proceeding by filing a counterclaim or cross-petition and by asking for affirmative relief, he thereby waives the question of personal jurisdiction."

And to support the latter rule, the author cites cases from the supreme court of the United States, the Federal courts, and seventeen states.

The reason for the rule is stated in *Austin Mfg. Co. v. Hunter,* 16 Okl. 86, 86 Pac. 293, where it is said:

"The rule just referred to is based upon the assumption that a defendant is involuntarily in court, and that he is being compelled to litigate the case against his will, and so long as he simply defends against the cause or causes of action pleaded in the plaintiff's petition, he can urge the want of jurisdiction over his person in the appellate court, but not so where he files a cross-petition and asks for affirmative relief, for, by such act, he voluntarily submits himself to the jurisdiction of the court, and vests it with power to render any judgment necessary in the disposition of any and all of the issues involved in the entire controversy."

Were this a case of first impression, we might argue against the first stated rule on the ground that it requires the defendant, who has the right to be sued only in a court having jurisdiction of his person, and also has the right when sued to defend upon the merits, to choose between these two rights, and forfeit one in order to preserve the other. But we think this court has already chosen the sounder and juster rule.

The case of *Woodbury v. Henningsen,* 11 Wash. 12, 39 Pac. 243, opinion by the late Justice Dunbar, was an action in replevin before a justice of the peace. Notice and complaint were served upon the defendant by delivering copies to a child under the age of twelve years. When the case was called for trial, the defendant moved to quash the return of service of process for the reason that the same had not been served according to law, specifying that the appearance was for this purpose only, which motion was overruled, and the defendant excepted. Thereafter the defendant demurred to the complaint, the demurrer was overruled,

the case proceeded to trial, resulting in a judgment against the defendant, and a writ of certiorari was sued out to the superior court, which was afterwards dismissed, and an appeal from that order was taken to the supreme court, which said:

"It is conceded by respondent that the service in the case was not sufficient to confer jurisdiction of the person on the justice, but the contention is that the appellant waived that defect, submitted to, and conferred jurisdiction of the person on the justice by continuing in the case, excepting to the rulings of the justice thereafter, appearing generally and answering, and going to trial after his objection by way of special appearance was overruled by the justice.

"The authorities upon this question are not uniform, some courts holding that it is incumbent upon the party claiming a want of jurisdiction to stand upon his special motion, while others hold to the doctrine that when the special motion is made and overruled, no waiver will be imputed by proceeding to try the case upon its merits. We think the latter position is the better one, and therefore hold that the justice's court did not obtain jurisdiction by general appearance entered by the defendant, after his motion had been overruled."

The *Woodbury* case was cited with approval in *Walters v. Field,* 29 Wash. 558, 70 Pac. 66, and it was there held, upon facts clearly distinguishable from the case at bar, that the defendant had, by a voluntary general appearance, waived his special appearance, and it was there said:

"The defendant could have preserved his special appearance in his answer to the merits, but he did not see fit to do so."

To the same effect are: *Morris v. Healy Lumber Co.,* 33 Wash. 451, 74 Pac. 662; *Larsen v. Allan Line Steamship Co.,* 37 Wash. 555, 80 Pac. 181, 9 L. R. A. (N. S.) 1258; *Hodges v. Price,* 38 Wash. 1, 80 Pac. 202;

Gaffner v. Johnson, 39 Wash. 437, 81 Pac. 859; *Columbia & P. S. R. Co. v. Moss,* 53 Wash. 512, 102 Pac. 439; *Steenstrup v. Toledo Foundry & Machine Co.,* 66 Wash. 101, 119 Pac. 16, Ann. Cas. 1913C 427; *In re Martin's Estate,* 82 Wash. 226, 144 Pac. 42.

The appellant relies upon the cases of *Teater v. King,* 35 Wash. 138, 76 Pac. 688, and *Bain v. Thoms,* 44 Wash. 382, 87 Pac. 504, arguing that these cases show a departure from the rule laid down in the *Woodbury* case. We do not so read them. In the *Teater* case the defendant filed a motion in the form of a special appearance, wherein he moved (1) to quash the summons and set aside the service thereof; (2) to set aside and quash the writ of restitution for the reason that the same was prematurely issued, and that the court had no jurisdiction to issue the same; and (3) to dismiss the action for the reason that no summons had been issued and served as required by law. The trial court sustained the motion to quash the summons and set aside the service thereof, but refused to quash the writ of restitution or dismiss the action, to which ruling the appellant excepted. A second summons was afterwards issued and the appellant answered to the merits. The court said:

"There would be much force in appellant's contention, if he had not asked the court below to dismiss the action. The appearance of appellant was in form special, for the purpose of objecting to the court's jurisdiction over his person, but in the body of his motion he invoked the jurisdiction of the court below on the merits, when he asked for a dismissal. A party desiring to successfully challenge jurisdiction over his person should not call into action the powers of the court over the subject-matter of the controversy."

Thus it will be seen that the court held that the first appearance by motion to quash, though denominated special, was in fact general because it invoked the

jurisdiction of the court below in asking for a dismissal of the action. Clearly this case in nowise overrules or modifies the *Woodbury* case or the rule there adopted.

The *Bain* case presents the same question as the *Teater* case. Service was attempted to be made by leaving copies of the summons and complaint at a place where the defendants were alleged to have their usual place of abode. Neither appeared, and some ninety days thereafter, default and judgment were entered. Subsequently defendants, by motion, which was termed special, moved that the judgment be set aside, that the action be dismissed, that the defendants have judgment against the plaintiff for their costs and disbursements, and for such other and further relief as to the court may seem just. The court said:

"In the motion wherein appellants assumed to appear specially they did not ask to have the service of summons and complaint quashed, nor did they confine themselves to a prayer for the setting aside of the default and judgment, but they prayed that the judgment be set aside and that the action be dismissed, and that they have judgment for costs and disbursements, and such other relief as to the court might seem just; and they based their motion upon the records, files and certain affidavits, some of the latter setting forth facts going to the merits of the controversy. We think their appearance must be construed to be general."

We think nothing in either of these cases lends support to the appellant's contention. It is, therefore, apparent that the question involved has long been a settled one in this state, and as the rule so followed is sound in reason and accords with justice, it should not now be disturbed.

Does respondent come under this rule? There can be no question but that defendant's first appearance was special in fact as well as in name, and an exception

to the ruling of the court thereon was preserved to it by the statute, Rem. Code, § 382. It preserved its special appearance in its subsequent appearances, and did not ask for affirmative relief.

The true rule on affirmative relief is laid down by the supreme court of the United States in *Merchants Heat & Light Co. v. Clow & Sons,* 204 U. S. 286, in which case a motion to quash the return of service was made and overruled, and thereupon the defendants, after excepting, appeared as ordered and pleaded the general issue, and also a recoupment or set-off of damages under the same contract. The court said:

"We assume that the defendant lost no rights by pleading to the merits, as required, after saving its rights. *Harkness v. Hyde,* 98 U. S. 476; *Southern Pacific Co. v. Denton,* 146 U. S. 202. But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it. It is true that the counterclaim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper. But even at common law, since the doctrine has been developed, a demand in recoupment is recognized as a cross-demand as distinguished from a defense. Therefore, although there has been a difference of opinion as to whether a defendant by pleading it is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross-demand, and that whether he shall do so or not is left wholly to his choice. [Citing cases.] This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences. The right to do so is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense."

Having preserved its special appearance, and not having invoked the jurisdiction of the court for affirmative relief, respondent's counsel were not bound upon incidental matters and motions, and whenever they arose to address the court, to preface their remarks by stating a special appearance. We have carefully examined the whole record, and especially the points called to our attention by the appellant, and find none of them sufficient to constitute a waiver of the special appearance.

The question of the striking of the third amended complaint and the dismissal of the action as to Birch was properly treated in the former opinion and requires no further discussion.

The judgment is affirmed.

MITCHELL, MOUNT, and MACKINTOSH, JJ., concur.

PARKER, J. (concurring)—I concur in the foregoing opinion, though it overrules the former opinion written by myself. Further reflection convinces me that the error in the former opinion lies in the failure to note the distinction between invoking the court's jurisdiction at the same time of moving to quash service of process, and invoking the court's jurisdiction, practically by compulsion, after the overruling of a motion to quash service of process.

MAIN, C. J.—I concur in the view expressed by Judge Parker.

CHADWICK, J. (concurring)—I agree with the conclusions of the majority, but I do not concur in all that is said of *Teater v. King,* 35 Wash. 138, 76 Pac. 688, and *Bain v. Thoms,* 44 Wash. 382, 87 Pac. 504. It may be that, if properly explained in the light of the record, these cases can be severally distinguished, but they have stood out since their pronouncement as a hold-

ing on the part of this court that a prayer for the dismissal of an action is a general appearance, and they should be overruled, or we should at least declare that the language employed was inadvertent and should not longer receive the full measure of its weight in words.

To say that a special appearance by motion to quash a summons, or a challenge to the jurisdiction of the court over the person of a defendant, followed by a prayer for a dismissal of the action, is a general appearance is not consistent with reason or common sense. It does not rise to the dignity of the ridiculous. To put in words a prayer for that which would follow as a matter of course under the statute, or to voice audibly the form of the only order which the court has jurisdiction to make, is not a waiver of a special appearance. The result of such a holding amounts to this. If a defendant appears specially and moves to quash a summons, or asserts an evident lack of jurisdiction and says nothing more, the court, if his motion be well taken, will enter an order of dismissal. If he asks *in writing* for the only relief the court has jurisdiction to give he has made a general appearance. Why it should ever have been held that a prayer for a dismissal changes the defendant's right under the statute and robs a special appearance of its character is beyond my power of comprehension.

It was asserted in consultation that a judgment of dismissal might be a bar to another action, and for that reason was a judgment going to the merits, but I have always understood the law to be that a motion to dismiss for want of jurisdiction over the person of the defendant was analogous to a judgment of nonsuit, and is never held to be a bar to another proceeding involving the same subject-matter. 15 R. C. L. 982.

I would have been pleased to have subscribed to an opinion admitting the general construction and accept-

ance of the two cases relied on and overruling them in terms.

HOLCOMB, J. (dissenting)—I dissent. To my mind the original opinion was erroneous in that it should have sustained the service of process upon authorized agents of the corporation in this state, the corporation not having been effectually dissolved, under the laws of Nevada, where it was organized, as to causes of action existing against it.

[No. 14532. Department One. September 23, 1918.]

KING COUNTY, *Plaintiff*, v. GUARDIAN CASUALTY & GUARANTY COMPANY, *Appellant*, MANHATTAN CONTRACTING COMPANY *et al.*, *Defendants and Respondents*.[1]

GUARANTY — OF PAYMENT — CONTRACT — CONSTRUCTION. A letter from the surety upon a contractor's bond requesting a bank to make a loan to the contractor which was agreed should be a claim against the bond in case of loss on the job, is a contract of guaranty upon which the surety was directly liable without the filing of a claim against the bond.

APPEAL—REVIEW—OBJECTIONS BELOW. Want of authority of an attorney in fact to execute a contract, not raised below, cannot be presented on appeal.

COUNTIES—CLAIM AGAINST BOND—CONTRACT. The bond to secure claims against a contractor on county work covers sums due for the rental value of scows and other equipment used by the contractor for handling concrete and also the rental value of tugs which towed scows loaded with material that entered into the construction.

SAME—CLAIM AGAINST BOND—ATTORNEY'S FEES. Semble, that where there is a controversy, attorney's fees are allowable to claimants in an action by a county to interplead claims against a contractor's bond.

[1]Reported in 175 Pac. 166.

APPEAL — REVIEW — OBJECTIONS BELOW. Error in allowing attorney's fees in an action of interpleader cannot be raised for the first time on appeal.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 18, 1916, in favor of certain lien claimants, in an action in interpleader, tried to the court. Affirmed.

Ernest B. Herald and *Reeves Aylmore, Jr.*, for appellant.

Farrell, Kane & Stratton, for respondent American Savings Bank & Trust Company.

Turner & Hartge, for respondent Harper Barge & Lighterage Company.

Smith, Newcomb & Worthington, for respondent Chesley Tug & Barge Company.

MAIN, C. J.—In July, 1915, the Manhattan Contracting Company entered into a contract with King county for the construction of a bridge across the Duwamish river. The price agreed upon was $26,594. The contract provided for the payment, upon the county engineer's estimates, of not to exceed seventy-five per cent of the amount earned monthly, and the retention of twenty-five per cent of the contract price until completion and acceptance of the bridge and payment of all claims and charges incurred in performing the work. The Guardian Casualty & Guaranty Company became the surety on this contract. Thereafter the contracting company began the construction, and the work was fully performed and accepted June 21, 1916.

In March, 1916, the contracting company's account was transferred from the bank with which it had been doing business prior to that time to the American Savings Bank & Trust Company. On March 16, 1916, the bonding company made request as follows:

"American Savings Bank & Trust Co.,
"Seattle, Washington.

"Gentlemen: The Manhattan Contracting Company will receive in the neighborhood of $10,000 upon the completion of the Duwamish bridge. The said Manhattan Contracting Company is bonded by the undersigned Guardian Casualty Company on this work. We are consenting to their making a loan from your bank in the sum of $3,500, and your advancing this amount of money will be a claim against the fund and against the bond in case of its nonpayment by said contracting company. This will be your authority to furnish the Manhattan Contracting Company the sum of $3,500, and is our consent to have your claim for the said sum recognized as a valid claim against our bond in case of a loss upon the said job. This cancels all former letters. Yours very truly,

"Guardian Casualty & Guaranty Company,
"By Reeves Aylmore, Jr.,
"Seal. Attorney-in-Fact."

The bank accepted the promissory note of the contracting company for $3,500 and credited that amount to its account. All checks drawn upon the account were countersigned by the bonding company through its attorney in fact. This money was expended by the contracting company in completing the bridge and settling claims incurred under the contract. On April 21, 1916, the bonding company requested an additional loan for its principal as follows:

"Previous to this time the undersigned has consented to your having a claim against the bond of the Manhattan Contracting Company on the Duwamish bridge. This will be your authority to increase the amount of your claim by thirty-five hundred dollars ($3,500) advanced today to the Manhattan Contracting Company; this additional amount to be a part of your written consent given by us heretofore.

"Yours very truly,
"Reeves Aylmore, Jr.,
"Attorney for Guardian Casualty
"& Guaranty Company."

The contracting company's note for this second loan was accepted by the bank, the money being credited to its account and checked out in the same manner as the first loan. The contracting company, prior to borrowing any money from the American Savings Bank & Trust Company, gave to the National City Bank an assignment of all moneys to become due under the contract. The contracting company made assignment to the American Savings Bank & Trust Company, as collateral security for loan by the latter to it, and procured a release from the National City Bank of the prior assignment, the claims thereunder being satisfied with a part of the money obtained on the second loan. The remainder of the second loan was expended in the prosecution of the work and in payment of claims for labor and material under the contract.

It appears from the evidence that the Chesley Tug & Barge Company was employed by the contracting company to tow scows loaded with materials entering into the construction of the bridge, also to salvage steel that had fallen into the river.

The Harper Barge & Lighterage Company rented to the contracting company a scow to be used to support a concrete mixer. The scow was occasionally used for carrying lumber and other materials from the shore to the bridge.

Within the prescribed time (thirty days from date of formal acceptance of the work by the county), claims were filed with the county against the contractor and against the bond. Among these were claims of Chesley Tug & Barge Company in the sum of $315.45, and Harper Barge & Lighterage Company in the sum of $312.65. The American Savings Bank & Trust Company did not file a claim against the bond, but asked judgment against the bonding company direct, relying

on guaranty of the bonding company, and also claiming the retained fund by assignment from the contracting company if any remain after satisfying the claims filed.

After the work was completed, King county brought an action interpleading the various claimants to adjudicate and determine their claims, depositing with the court for distribution among the claimants $8,880.33 retained under provisions of the contract, being $2,592.92 in addition to the 25 per cent to be paid upon completion of the work.

The action was tried to the court. Judgment was rendered against the contracting company and bonding company in favor of the bank for $7,000, in favor of Harper Barge & Lighterage Company for $312.65, and in favor of Chesley Tug & Barge Company for $202.95. An allowance was made for an attorney's fee in each case. Other claimants were given judgment, but about these there is no controversy here. The sum deposited with the court was to be distributed *pro rata* among the claimants, with the exception that the judgment of the bank was made junior and subordinate to the rights of the other claimants; that is, the bank was not to participate in the fund until the amounts decreed to the other claimants had been paid.

The appeal, so far as it relates to the American Savings Bank & Trust Company, will be first considered It is contended by the appellant that the writings above set out were not guaranties, and for this reason the judgment was erroneous. The question then is whether the Guardian Casualty & Guaranty Company guaranteed the payment of the $7,000 by its instruments in writing. It will be noted that the bank advanced the funds on the written requests of the bonding company, the first request stating:

"Your advancing this amount of money will be a claim against the fund and against the bond in case of its nonpayment by said contracting company. . . . This will be your authority to furnish the . . . sum of $3,500, and is our consent to have your claim for the said sum recognized as a valid claim against our bond in case of a loss upon the said job."

The second request was for an increase of the loan and was made "a part of your written consent given by us heretofore."

The meaning of the parties must be gathered from the written instruments constituting the contract. It seems to be reasonably plain that it was the intention of the parties, as evidenced by the writings, that the bonding company was to indemnify the bank against any loss by reason of the loans mentioned. If this was not the intention it is difficult to see what meaning is to be given to the instruments. It does not appear that they were given for any specific purpose other than to indemnify the bank in the event there was a loss on the job and the contracting company did not repay the money.

The case is unlike that of *Van Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co.*, 99 Wash. 68, 168 Pac. 1124, in two respects. First, the writing in that case did not contain as does the one here, a statement that the money advanced should constitute a valid claim against the bond. The second distinction is that, in that case, the request was made upon a specific promise to do something else than repay the money advanced, while in the case now before us the writings contain no such specific promise.

It is further contended that the attorney in fact for the bonding company did not have authority to execute the writings. This question, so far as the record discloses, was not raised in the trial court, and, for

that reason, it cannot be presented here for the first time. *Manny v. Spokane State Bank,* 78 Wash. 230, 138 Pac. 682; *Belcher v. Young,* 90 Wash. 303, 155 Pac. 1060. The court did not err in rendering judgment in favor of the bank.

The claim of the Harper Barge & Lighterage Company was based upon the rental value of a scow which was used for handling a concrete mixer, together with some other equipment for running the concrete into the central pier. The question here is whether the rental value of this scow is a proper claim against the bond.

In *Hurley-Mason Co. v. American Bonding Co.,* 79 Wash. 564, 140 Pac. 575, it was held that the rental value of pump and hoist derrick furnished to the contractor in the construction of a city bridge furnished the basis of a claim which could be allowed against the bond. There can be no substantial distinction between allowing the rental value of a pump and hoist derrick in such a case and the rental value of a scow which is used in the necessary prosecution of the work.

The claim of the Chesley Tug & Barge Company is based upon the rental value of tugs which towed scows loaded with material which entered into the construction of the bridge. This was a proper charge against the bond. *National Surety Co. v. Bratnober Lumber Co.,* 67 Wash. 601, 122 Pac. 337; *State Bank of Seattle v. Ruthe,* 90 Wash. 636, 156 Pac. 540.

In those cases it was held that the rental value of teams of horses used upon public work was a valid claim against the bond. This was on the principle that the rental value of the teams was a supply necessary to the prosecution of the work. No valid distinction can be drawn between the rental value of teams necessary to the prosecution of the work and the rental value of a tug boat employed in the same capacity.

The appellant concludes its opening brief with the suggestion that attorney's fees were not allowable to any of the respondents in an interpleader case of this character, and cites *Maryland Casualty Co. v. Washington Nat. Bank*, 92 Wash. 497, 159 Pac. 689. The holding in that case is not controlling upon this record. As pointed out in the opinion, the surety company brought the action to preserve the fund for the benefit of the claimants with whom there was no controversy. In addition to this, the question as to the allowance of attorney's fees appears not to have been raised in the trial court in the present case, and should not be considered for the first time upon the appeal.

The judgment will be affirmed.

FULLERTON and PARKER, JJ., concur.

[No. 14623. Department One. September 23, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN KOERNER, *Appellant*.[1]

CRIMINAL LAW—APPEAL FROM JUSTICE COURT—DISMISSAL—LACK OF DILIGENCE. One convicted in justice court of selling intoxicating liquors is guilty of laches in prosecuting his appeal to the superior court, where there were but three jury terms a year, all of which he allowed to pass following conviction without bringing the case on for trial; and it is not sufficient excuse to avoid dismissal that his attorney had agreed to notify him when wanted, where the attorney died in May and he took no steps to employ another before the September term.

INTOXICATING LIQUORS—OFFENSES—SALE BY DRUGGIST—COMPLAINT—SUFFICIENCY. A complaint in justice court against a druggist for selling intoxicating liquors in contravention of an ordinance is sufficient without alleging the name of the individual to whom the liquor was sold.

CRIMINAL LAW—APPEAL TO SUPERIOR COURT—COMPLAINT—AMENDMENT. Upon appeal from justice court, the complaint, if not suffi-

[1]Reported in 175 Pac. 175.

ciently definite, is subject to amendment on appeal to the superior court.

Appeal from an order of the superior court for Chelan county, Grimshaw, J., entered October 9, 1917, dismissing an appeal from a conviction in a police court, for want of diligence. Affirmed.

Hughes & Adams, for appellant.

L. J. Nelson, for respondent.

FULLERTON, J.—The appellant, John Koerner, was convicted in the police court of the city of Leavenworth, Washington, upon a charge of selling intoxicating liquors in contravention of an ordinance of that city. The defendant, in open court, gave notice of appeal to the superior court, and on September 12, 1916, perfected his appeal by filing his bond therefor. The transcript on appeal was certified by the police judge on September 19, 1916, and filed in the superior court on the 22d instant, too late for trial during the September jury term of that year. There are but three jury terms a year in Chelan county, fixed for the months of January, April and September. No move having been made by the appellant to bring the case to trial at the January term, 1917, the attorney for the state, on February 6, 1917, served a notice calling for the setting of the case for trial. No trial day was then fixed, and the case was again noted by the state's attorney for setting for trial in the April jury term. When the case was called at the April term, a stipulation was entered into passing it to the following September term, owing to the sickness of the appellant's attorney. The latter died in the month of May, 1917. The appellant made no attempt to bring the appeal to trial at the September term, and on September 14, 1917, the state served notice of a motion to dismiss the

appeal. This motion came on for hearing on October 4, 1917, and was sustained by the court. The appellant prosecutes an appeal from this order.

The only showing made by the appellant as an excuse for his lack of diligence in prosecuting his appeal from the police court is that his attorney had told him that he would be notified when anything further was to be done with the case, and that he rested in reliance upon that statement. It appears, however, that he knew the case had been passed for trial at the April term with an agreement to take it up at the September term. His attorney died in May, and he failed to employ another in his stead until after he was served with notice of the motion to dismiss his appeal for lack of diligence. The appellant had been convicted of violating a penal ordinance and had been sentenced to pay a fine of $250. Instead of conforming thereto, he took an appeal, ostensibly to relieve him from that penalty. He, however, made no effort to secure his exoneration by bringing the case on for trial, but allowed three jury terms to pass in the course of the year following his conviction. As long as he could have the matter rest in that condition, he was in effect evading the fine imposed on him. As the moving party in an appeal to set aside his conviction in the police court, the duty rested upon him to exercise proper diligence in securing a determination whether he should pay or be relieved from the fine. *State v. Buffum,* 94 Wash. 25, 161 Pac. 832. The dismissal of appeals in such cases is a matter within the discretion of the trial court, and from the showing made here we cannot say that there was any abuse of such discretion.

The further contention is made by the appellant that the complaint upon which he was convicted does not state facts sufficient to constitute a crime, in that it fails to state to whom he sold liquor unlawfully. There

is some conflict in the authorities as to whether it is necessary to name the purchaser in an indictment or information charging one with unlawfully selling intoxicating liquor. The better rule is tersely expressed in *Fletcher v. Commonwealth,* 106 Va. 840, 56 S. E. 149, where it is said: "The gist of the offense is the unlawful sale, and the name of the person to whom it was made is immaterial."

This ruling is favored, without being expressly decided, in our own case of *State v. Bodeckar,* 11 Wash. 417, 39 Pac. 645, where we said:

"The crime, under our statute, consists in the selling, and there would seem to be no reason why the name or names of the individual or individuals to whom the sale is made should be specified;"

citing *State v. Becker,* 20 Iowa 438; *State v. Schweiter,* 27 Kan. 499; *State v. Gummer,* 22 Wis. 422; *State v. Jaques,* 68 Mo. 260; *State v. Heldt,* 41 Tex. 220.

The ordinance which the appellant is charged with having violated declares it "unlawful for any person to manufacture, sell, barter, exchange, give away, furnish or otherwise dispose of intoxicating liquor." The complaint in the police court charged that "John Koerner did, on or about the 2d day of September, 1916, in the city of Leavenworth, Chelan county, state of Washington, unlawfully commit the crime of unlawfully selling intoxicating liquor; said sale being made by said John Koerner, a druggist, without a prescription or other authority under law, contrary to ordinance No. 169" of the city of Leavenworth. It is provided in § 7 of the same ordinance that,

"Nothing in this ordinance shall be construed to prohibit a registered druggist or pharmacist from selling intoxicating liquor for medicinal purposes, upon the prescription of a licensed physician as herein provided, or for sacramental purposes, upon the order of

a clergyman, as herein provided, or from selling alcohol for mechanical or chemical purposes only; but it shall be unlawful for such druggist or pharmacist to permit any such liquor to be drunk upon the premises where sold."

While the complaint, as is allowable in justices' courts, is somewhat informal, it sets forth the crime and sufficiently negatives the exception. The person to whom the sale was made was a matter of evidence, as well as the facts showing whether or not the sale fell within the exception. The complaint sufficiently charged the crime for a hearing in the justice court, and if the appellant demanded more particularity in the charge on a trial in the superior court, the complaint was subject to amendment in that tribunal. See: *State v. Newton,* 29 Wash. 373, 70 Pac. 31; *Everett v. Cowles,* 97 Wash. 396, 166 Pac. 786.

The order of the trial court dismissing the appeal is affirmed.

MAIN, C. J., MITCHELL, PARKER, and TOLMAN, JJ., concur.

[No. 14712. Department Two. September 23, 1918.]

ARTHUR B. KNEASS *et al., Respondents,* v. CREMATION SOCIETY OF WASHINGTON, *Appellant.*[1]

APPEAL — HARMLESS ERROR — NOT AFFECTING RESULT. Whether plaintiff split a single cause of action is immaterial, where on appeal it is decided that appellant was not liable on the second cause of action.

DEAD BODIES—NEGLIGENCE—DAMAGES—MENTAL SUFFERING. Since there can be no recovery for damages arising from mental anguish as a result of negligence when not accompanied by physical injury, there can be no recovery therefor against a cremation company for negligence in failing to keep and deliver the ashes of a child as provided in the parent's contract for its cremation.

Appeal from a judgment of the superior court for King county, Smith, J., entered November 1, 1917, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort. Reversed.

Peterson & Macbride, for appellant.

Oscar G. Heaton and *Cole & Dolby,* for respondents.

MOUNT, J.—In November, 1913, an infant child was born to Mr. and Mrs. Kneass. Three days later the child died. Its body was sent to the Cremation Society of Washington to be cremated. At that time Mr. Kneass was informed that the charges for the cremation, with an urn or permanent receptacle for the ashes, would be $12. He was also informed that the ashes of the infant would be safely cared for until called for. Mr. Kneass paid the cremation society $12 for the cremation of the body, and three years later called for the ashes of the infant, which could not be found. Thereafter another call was made for the ashes and a further effort failed to find them. Later, and

[1]Reported in 175 Pac. 172.

in January, 1917, Mrs. Kneass called the cremation society over the phone and was then informed that the ashes could not be found and that no further effort would be made to find them. Thereupon, Mr. and Mrs. Kneass brought this action for damages. The complaint alleged two causes of action, to the effect: First, that the defendant agreed that it would safely keep the ashes until called for by the plaintiffs; that the plaintiffs paid the defendant $12 for said cremation and an urn; that, upon demand, defendant refused to deliver the ashes or the urn; and that, by reason thereof, the plaintiffs were damaged in the sum of $2,500. For a second cause of action, the same facts were alleged, and the complaint then alleged further:

"That, because and by reason of their love and affection for said child, and its remains, and because and by reason of all the acts of negligence and carelessness of said defendant company in losing or destroying, or permitting to be lost or destroyed, or converting to their own use and benefit, the said urn and the said ashes of the said infant daughter, Elizabeth Kneass, so that plaintiffs have no knowledge of the last resting place of the remains or ashes of said deceased child, they have suffered great distress of mind, worry and mental agony, and their rest and peace of mind has been almost wholly broken up and destroyed, in so much that the physical health and welfare of plaintiffs has been seriously impaired and threatened; all to the damage of the plaintiffs in the sum of five thousand dollars ($5,000)."

For answer the defendant admitted receiving the body of the infant child at the time alleged; admitted that it received $12 for the cremation thereof and for an urn; admitted that the ashes had been lost, but denied any act of negligence. On these issues the case was tried to the court and a jury. The jury returned a verdict of $200 in favor of the plaintiffs on the first

cause of action and $300 upon the second cause of action. Upon motion for a new trial and for judgment notwithstanding the verdict, the court required the plaintiffs to remit all but $12 upon the first cause of action and denied a motion for a directed verdict, and entered judgment for $12 upon the first cause of action and $300 upon the second. The defendant has appealed from that part of the judgment allowing damages upon the second cause of action.

Appellant argues at length that the trial court should have sustained its objection to any evidence under the second cause of action, because respondents have undertaken by the complaint to split one cause of action into two causes. It will not be necessary, we think, to consider this point, because if two causes of action are stated and we should conclude that both should be stated as one, the result would be the same.

The main point made by the appellant is that there can be no recovery of damages arising from mental anguish or distress of mind as a result of negligence when not accompanied by physical injury. The appellant relies upon the case of *Corcoran v. Postal Telegraph-Cable Co.*, 80 Wash. 570, 142 Pac. 29, L. R. A. 1915B 552, where we held, in substance, that there could be no recovery on account of the nondelivery of a telegram which resulted in mental anguish where no physical injury or pecuniary loss resulted. The respondent relies upon *O'Meara v. Russell*, 90 Wash. 557, 156 Pac. 550, L. R. A. 1916E 743, and *Wright v. Beardsley*, 46 Wash. 16, 89 Pac. 172. In *Corcoran v. Postal Telegraph-Cable Co., supra,* we took occasion to review at length the authorities of this and other courts upon the question here presented; and, after a painstaking consideration of many authorities and much of the law upon this question, we there concluded that the

rule supported by the great weight of authority was that no damages could be recovered for mental suffering flowing from an act of negligence where there was no physical injury to the plaintiff. In that case, in referring to the case of *Wright v. Beardsley, supra,* we said:

"The plaintiffs were allowed damages for mental suffering unaccompanied by physical injury, flowing from the wrongful and improper burial of their infant child by the defendant. This decision we regard as the extreme proper application of the rules of law allowing damages for mental suffering alone, and we are constrained not to extend the doctrine beyond the application of the particular facts there involved. The acts were regarded by the court as wilful, and the wrong consisted in the violation of the rights of the parents to have decent interment for their infant child. It was also a physical invasion of the plaintiff's rights."

It will be seen that the rule in the *Wright* case was based upon a wilful wrong and the physical invasion of the plaintiff's rights. To apply that case to this would be to extend the rule in that case. The case of *O'Meara v. Russell, supra,* was written after the decision in the *Corcoran* case. In the *O'Meara* case, the facts were that an explosion caused a stump to be thrown through the air and against the home of Mrs. O'Meara while she was standing in the door and saw the stump coming towards her; that, through fear and effort to protect herself and escape the threatened danger, she suffered injury to her person and to her nervous system. That was a case where physical injuries resulted to the plaintiff at the time, and we, in effect, held that the injury caused by the fright and shock was not psychological but was physical, and for that reason sustained a recovery. We are of the opinion that the *O'Meara* case is plainly distinguish-

able from this case because the fright and shock caused the physical injury at the time. In the case now before us, there is no allegation that there was any physical injury. The allegation is that the plaintiffs

"have suffered great distress of mind, worry and mental agony, and their rest and peace of mind has been almost wholly broken up and destroyed in so much that the physical health and welfare of plaintiffs has been seriously impaired and threatened; . . ."

It is apparent from this allegation that, whatever physical injury has resulted to the health of the respondents, has been from mental worry and agony and not from physical injury. In the *O'Meara* case, the mental anguish was the result of physical injury at the time. The respondents claim in their brief that there was wilful disregard of the respondents' rights, but the only evidence in the record of any wilful disregard of the respondents' rights is the fact that, after the appellant had made two or three unsuccessful efforts to find the ashes of the infant child, it told the respondents it would have nothing further to do with the matter. The record conclusively shows that, at most, the appellant was negligent in not keeping these ashes where they could be found at any time. No other negligence is alleged or claimed; so that it is apparent, both from the evidence and from the allegations of the complaint, that there was no wilful or wanton conduct on the part of the crematorium society in losing the ashes. The evidence tends to show at least that the loss was caused by reason of the length of time the ashes were kept—three years after cremation, and no call for them within that time—and that probably the label was lost from the urn and, for that reason, the ashes could not be identified. We are of the opinion that the rule announced in *Corcoran v. Postal Telegraph-Cable Co., supra,* is the rule properly applicable

to the facts in this case, and that, under that rule, there could be no recovery for mental suffering and anguish caused by negligence where no physical injury was inflicted and no pecuniary loss resulted.

We are satisfied, therefore, that the trial court should have refused the evidence offered under this cause of action, and should have granted judgment notwithstanding the verdict thereon.

That part of the order appealed from is therefore reversed.

MAIN, C. J., and HOLCOMB, J., concur.

MACKINTOSH, J. (concurring)—I am forced to the conclusion that this court has heretofore adopted two irreconcilable positions in actions seeking to recover damages for injuries alleged to have resulted in mental suffering. The case of *Wright v. Beardsley,* 46 Wash. 16, 89 Pac. 172, allowed recovery for mental suffering arising from the wrongful and improper burial of the plaintiff's child; *Corcoran v. Postal Telegraph-Cable Co.,* 80 Wash. 570, 142 Pac. 29, L. R. A. 1915B 552, denied recovery for mental suffering arising from the wrongful and improper handling of a telegram notifying the plaintiffs of the death of their child. The *Corcoran* case does not, in terms, overrule the *Wright* case, but in effect it does so, although the opinion, in referring to the *Wright* case, attempts a distinction on the ground that the act there complained of was a physical invasion of the plaintiff's rights. In the case of *O'Meara v. Russell,* 90 Wash. 557, 156 Pac. 550, L. R. A. 1916E 743, a recovery was allowed for injuries resulting from fright, the court attempting to distinguish that case from the *Corcoran* case on the ground that fright was accompanied by physical injuries resulting therefrom, the complaint in that case having alleged that "the plaintiff did suffer great men-

tal and physical pain and fright, and because of said fright and in her attempt to escape from the threatened danger, she was compelled to, and did, flee from said house, and became and was injured in and about her nerve-centers, and her nervous system was greatly shocked and injured."

Science teaches—and our common experience confirms it—that every severe mental disturbance, whether it takes the form of fright, or anger, or sorrow, or nostalgia, or any other violent emotional expression, has a concomitant physical result, the manifestation of the physical accompaniment being governed by the condition of the subject and by the intellectual control which he has of himself. The greater the will power which a subject may possess, the less will be the physical effect of the mental disturbance. If these statements are true, there is no such thing as acute mental pain and suffering without some physical effect, in many cases not subject to ocular proof, but present in all cases and only differing in degree; and it follows that every allegation of mental pain and suffering impliedly includes the physical effect which accompanies it.

The *Corcoran* and *O'Meara* cases are, therefore, in conflict, as a matter of fact, though the distinction is sought to be made upon the ground that, in the *O'Meara* case, there was an allegation of physical pain and suffering, while there was no such allegation in the *Corcoran* case. If this is a true ground for distinction, then the case at bar falls directly within the *O'Meara* case; for, in the case at bar, the allegations of the effect of the defendant's acts are set forth in the complaint as quoted in Judge Mount's opinion, and I am unable to distinguish them from the allegations in the *O'Meara* case. In both cases it was alleged that physical injuries had been inflicted by, and as a result

of, the mental pain and suffering; and it is beyond my power of discrimination to differentiate between the physical effect which may result from sorrow and the physical effect which may result from fright. If there is no such difference, then the case at bar cannot be distinguished from the *O'Meara* case. Attempting to distinguish it, the writer of the opinion says: "We are of the opinion that the *O'Meara* case is plainly distinguishable from this case because the fright and shock caused the physical injury at the time. In the case now before us, there is no allegation that there was any physical injury." The latter statement is not borne out by the quotation from the complaint referred to. The attempt to distinguish upon the ground that the physical injury was coincident with the fright in one case, and was not coincident with the sorrow in the other, is not convincing, and would seem to put a premium upon those who have little control over their emotional demonstrations.

In my opinion, the *O'Meara* case should have fallen within the rule of the *Corcoran* case, for the reason that the physical result of mental pain and suffering cannot be separated from the mental pain and suffering itself, and that it always accompanies mental pain and suffering to some extent; and the case at bar being "on all fours" with the *O'Meara* case, is correctly decided when it repudiates the doctrine of that case and follows the *Corcoran* decision. I concur in this result, but feel that the opinion should expressly recognize that the doctrine announced in the *O'Meara* case is improper, and expressly overrule that case, as it has actually been overruled.

CHADWICK, J., concurs.

[No. 14756. Department One. September 23, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. R. W. BLACKWOOD, *Appellant*.[1]

ROBBERY — EVIDENCE — POSSESSION OF MONEY — ADMISSIBILITY. Where three defendants, jointly charged with robbery, acted in concert, money found on each when arrested shortly after, is relevant, although the prosecuting witness could not identify all his money, nor any of the money found on two of them.

WITNESSES—CROSS-EXAMINATION—IMPEACHMENT. Where, at the time of a robbery, the prosecuting witness was told that defendants belonged to the I. W. W., it is proper cross-examination of a defendant who denied commission of the offense to ask if he belonged to the I. W. W.

SAME — CROSS-EXAMINATION — CREDIBILITY. In a prosecution for robbery by defendants claiming to belong to the I. W. W., it is proper cross-examination of defendant's witnesses to ask if they belonged to the I. W. W., as bearing on their interest in the defendants and affecting their credibility.

CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial for newly discovered evidence should not be granted where it is not shown that it could not have been discovered by reasonable diligence, and it would not likely change the result.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered October 5, 1917, upon a trial and conviction of robbery. Affirmed.

N. M. Sorenson, for appellant.

Burt J. Williams and *N. A. Pearson*, for respondent.

PARKER, J. — The defendants, Blackwood, Jerry Young and H. Schram, were charged jointly with committing the crime of robbery in Chelan county. Trial in the superior court for that county resulted in verdict and judgment of conviction against Blackwood. A separate trial was granted him upon his demand

[1]Reported in 175 Pac. 168.

therefor. He has appealed from that judgment to this court.

The prosecution proceeded upon the theory that the robbery was committed as the concerted action of all three of the defendants. The prosecuting witness, Erickson, testified, in substance, that, while resting in the shade on the bank of the river, in the town of Leavenworth, the robbery occurred as follows:

"Them fellows came over there, and Mr. Blackwood he was ahead and Schram was right after him, and Jerry Young had a bottle of alcohol or something like that in his hand. He takes a drink and he gives Schram a drink, and Blackwood comes right over where I was sitting on the left side and he hands that bottle to me, and I took that bottle and put it to my mouth, but I didn't drink it, and I handed it right over to Blackwood and he takes a drink of it; he handed it back to Jerry Young again and Jerry Young he says, 'You dig up $2 so we can have a bottle of liquor.' I said, 'I don't want any liquor and I don't want to give up any $2.' Then he says 'you got to look out for this bunch; they is I. W. W.'s.' I said like this, 'I don't see why I should be on the lookout for you fellows because I have did no harm to anybody.' Then Jerry Young, he says, 'Take the money away from him,' and he grabs my right wrist and Schram he takes hold of my other, left wrist, and Blackwood grabs me and chokes me, and the other hand he searched my pocket, and after he got the money he ran away. . . . He took $109 in cash, an $80 check, $80.51, and a handkerchief, silk handkerchief. . . . Well, I started to get out of there and Mr. Schram, he said, 'You go call on the marshal now and I will kill you,' but I didn't say nothing. I just went up the street and I called on the marshal, and them fellows, Mr. Schram and Mr. Young was still there."

Erickson immediately reported the robbery to the marshal of Leavenworth, and the three defendants were arrested within an hour or so after the robbery.

A silk handkerchief was found upon appellant which was identified by Erickson and his wife as his. One hundred and eighty-six dollars in currency was also found upon appellant, $7 was found on Young, and $17 was found on Schram. Erickson identified some of the bills found on appellant as being some of those he was robbed of, but could not identify as his money any of the money found on Young or Schram.

It is first contended in appellant's behalf that the trial court erred in admitting in evidence the money found on Young and Schram. Since the three defendants were jointly charged as having acted in concert in the commission of the robbery, and the prosecuting witness had so testified, we think the money found on each of the defendants was a relevant fact which could properly be shown by evidence in the state's behalf. It may be that the finding of these small amounts of money on Young and Schram soon after the robbery, and the failure of Erickson to identify any part thereof as his money, rendered this fact of but little probative force in the proving of appellant's guilt; but that of itself is not ground for excluding evidence of the fact. Plainly this evidence was not prejudicial to the rights of appellant, in that it excited prejudice in the minds of the jurors against appellant by directing their minds to some possible wrong he may have committed apart from the crime charged.

Appellant was asked by the prosecuting attorney if he belonged to the organization known as the I. W. W. It is claimed that the trial court erred in permitting this question to be asked and answered over the objection of counsel for appellant. Since appellant had testified upon his direct examination as to what occurred at the time he was present with Erickson when the latter claimed he was robbed, and had denied commission of the alleged robbery, and the state's evidence

had tended to show that the robbery was committed by the three defendants acting in concert, at the same time warning Erickson that "You got to look out for this bunch; they is I. W. W.'s," we fail to see wherein this was not proper cross-examination.

The same question was permitted by the court to be asked of and answered by some of appellant's witnesses upon their cross-examination by the prosecuting attorney, over the objections of counsel for appellant. Plainly this was not error. The question and answer bore directly upon the witnesses' interest in the defendant, and the answer was, therefore, relevant to the question of the witnesses' credibility.

Contention is made in appellant's behalf that the trial court erred in refusing to grant his motion for a new trial upon the ground of newly discovered evidence. The affidavits submitted in support of this motion fail to show that the evidence sought to be produced is in law newly discovered; that is, that appellant or his counsel could not have, by reasonable diligence, discovered it before the trial. Besides, it seems to us, as it evidently did to the trial court, that the alleged newly discovered evidence would not be likely to change the result upon a new trial. We think the court did not err in denying the motion.

Some other claims of error are briefly argued. We think they are without merit and do not call for further discussion.

The judgment is affirmed.

MAIN, C. J., TOLMAN, MITCHELL, and FULLERTON, JJ., concur.

[No. 14836. Department Two. September 23, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. HARRY KEECH *et al.*, *Appellants*.[1]

CRIMINAL LAW—RIGHTS OF ACCUSED — MEETING WITNESS — TRIAL. It is not error, in that accused did not meet the witnesses face to face, as required by Rem. Code, § 2306, that the stenographer read over the testimony of a witness for the benefit of a juror who fell asleep, and the accused was then given opportunity to ask the witness any questions whether previously covered or not.

LARCENY—OWNERSHIP OF PROPERTY—EVIDENCE—INCORPORATION OF COMPANY. In a prosecution for stealing a calf alleged to belong to the S. stock company, it is not material to prove that the company was incorporated, where it was shown to be dealing in stock; hence oral evidence of its incorporation is not prejudicial.

SAME—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a conviction of stealing a calf, where its head, hide, and feet were identified, and there was evidence that it was in the possession of the defendants, who sold it to a butcher.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered December 12, 1917, upon a trial and conviction of larceny. Affirmed.

Charles Bolin, O. B. Root, and *Jno. H. Bruff,* for appellants.

O. R. Schumann and *J. Lenox Ward,* for respondent.

MOUNT, J.—Appellants were convicted of stealing one head of neat cattle, the property of the Satus Stock Company, a corporation, and of the value of $35. They appeal from a sentence pronounced upon the verdict of a jury.

Upon the trial, when a witness for the state was being cross-examined by counsel for the appellants, the counsel noticed that one of the jurors was asleep.

[1]Reported in 175 Pac. 176.

He addressed the juror, saying: "You were asleep?" The juror nodded his head in the affirmative. The court, addressing the juror, said: "You didn't hear the testimony?" To which the juror made no response. Thereupon the court directed the reporter to read the testimony of the witness to the juror. Counsel for appellants objected thereto, and the objection was overruled. Thereupon the reporter read aloud all the testimony given by the witness. The court then asked the juror: "Did you hear all of the testimony up to the time this witness took the stand?" The juror answered, "Yes, sir." The court then said to counsel: "You may ask the witness any question you desire on cross-examination, whether you have already covered the ground or not." Counsel for appellants thereupon objected to further proceeding with the trial.

It is argued now that this was error, prejudicial because, under Rem. Code, § 2306, appellants were entitled to meet the witnesses face to face. We think this statute is not applicable to the question here presented, because it is plain that the appellants did meet the witness face to face. The evidence, as taken down by the stenographer, was read to the jury in the presence of the appellants. The result was the same as though the witness had repeated his testimony *verbatim*. Furthermore, the court granted leave to counsel to reexamine the witness, and, if any prejudice occurred by reason of the fact that the juror fell asleep, counsel for the appellants had an opportunity to fully apprise the juror of everything that had occurred. We are satisfied, therefore, that there was no error in this proceeding.

It is next argued by the appellants that there was no proof of the incorporation of the Satus Stock Company. At least two witnesses testified that the Satus

Stock Company was a corporation and that it owned the calf which was stolen. Whether the corporation was in fact legally incorporated was not material. The rule is stated in 3 Ency. of Evidence, page 594, as follows:

"On a prosecution for an offense committed on the property of a corporation, proof that a corporation was a *de facto* corporation doing business as such in the corporate name set out in the indictment is sufficient. It is not necessary that it should be proven to be a corporation *de jure.*"

See, also, *People v. Barric,* 49 Cal. 342; Rem. Code, § 2156.

There was evidence to the effect that the corporation was dealing in stock at the time and place named in the information, and we are clearly of the opinion that this was sufficient without showing that the company was legally incorporated.

It is next argued that the evidence was insufficient upon which to base a verdict. Without reciting the evidence, it is sufficient to say that the calf which was lost to the corporation was identified by two officers thereof, who recognized the head, hide and feet of the calf, which had been killed; the calf was in the possession of the appellants; it was sold by them to a butcher; and the butcher paid them for it. We are satisfied that the evidence was sufficient to be submitted to the jury.

We find no error in the record, and the judgment must therefore be affirmed.

MAIN, C. J., HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14625. Department Two. September 24, 1918.]

G. G. HUNTER, *Appellant*, v. N. S. BERRIDGE *et al.*, *Respondents*.[1]

OFFICERS—ACTION ON BOND—LEAVE TO SUE—PLEADING—WAIVER. Under Rem. Code, § 960, providing that, in an action on an official bond by a plaintiff other than the state, the defendant on motion shall be entitled to judgment of nonsuit if it does not appear from the complaint that leave to sue was first obtained, the objection is properly taken by demurrer, which answers the purpose of a motion, and is not waived by pleading over, after exceptions taken.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered July 10, 1917, in favor of the defendants, notwithstanding the verdict of a jury rendered in favor of the plaintiff, dismissing an action upon an official bond. Affirmed.

E. C. Dailey, for appellant.

Cassius E. Gates and *Louis A. Merrick*, for respondents.

MOUNT, J.—This appeal is from a judgment of nonsuit entered after the verdict of a jury. The action was brought upon the official bond of N. S. Berridge, as constable in Arlington precinct, Snohomish county, to recover the value of certain property alleged to have been wrongfully levied upon and sold upon execution issued out of a justice of the peace court in a case to which the plaintiff in this action was not a party. The complaint did not show that leave to maintain the action had been granted by the trial court. The defendants, being the principal and sureties upon the official bond, filed a demurrer to the complaint. This demurrer was overruled and an exception taken. The defendants then answered by general denial and an

[1]Reported in 175 Pac. 165.

affirmative defense, to the effect that the property was in fact the property of the judgment debtor. Upon issues so made, the case was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff. The defendants then moved the court for judgment notwithstanding the verdict. This motion was granted and the court entered an order of nonsuit. The plaintiff has appealed.

The statute, at Rem. Code, § 960, provides as follows:

"Before an action can be commenced by a plaintiff, other than the state, or the municipal or public corporation named in the bond, leave shall be obtained of the court, or judge thereof, where the action is triable. Such leave shall be granted upon the production of a certified copy of the bond, and an affidavit of the plaintiff, or some person in his behalf, showing the delinquency. But if the matter set forth in his affidavit be such that, if true, the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that the leave herein provided for has been granted, the defendant, on motion, shall be entitled to judgment of nonsuit; if it does, the defendant may controvert the allegation, and if the issue be found in his favor, the judgment shall be given accordingly."

This statute states:

"If it does not appear from the complaint that the leave herein provided for has been granted, the defendant, on motion, shall be entitled to judgment of nonsuit; . . ."

This fact did not appear, and, of course, the respondents were entitled to a judgment of nonsuit. Appellant argues that, by filing a demurrer and not a motion, the respondents waived their right to a nonsuit. Appellant relies upon *Nye v. Kelly,* 19 Wash. 73, 52 Pac. 528. In that case there was no demurrer to the

complaint and no motion for a nonsuit. That case holds that the question must be promptly made, and comes too late after issue joined and the empaneling of a jury. Here the question was promptly raised by demurrer. The demurrer answered the purpose of a motion. *Wilkeson Coal & Coke Co. v. Driver,* 9 Wash. 177, 37 Pac. 307. Pleading over after demurrer did not waive the objection. *West v. Martin,* 47 Wash. 417, 92 Pac. 334; *Benjamin v. Ernst,* 83 Wash. 59, 145 Pac. 79. The court should have sustained the demurrer and granted the nonsuit before the case was tried.

The order appealed from is therefore affirmed.

MAIN, C. J., HOLCOMB, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14767. Department One. September 24, 1918.]

MARY CLANCY, *Executrix etc., Appellant,* v. ANNA B. STEINKE *et al., Respondents.*[1]

FRAUDULENT CONVEYANCES — TRANSACTIONS BETWEEN RELATIVES — EVIDENCE—SUFFICIENCY. The mere fact that conveyances were made from mother to sons in consideration of debts due from her to them, while she was indebted, do not make them fraudulent as to creditors, and they may be upheld if, critically examined, the evidence supports findings that they were on sufficient consideration (TOLMAN, J., dissents).

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered July 16, 1917, in favor of the defendants, dismissing an action to set aside deeds as in fraud of creditors, after a trial on the merits. Affirmed.

Sharpstein, Smith & Sharpstein, for appellant.

Edward Von Tobel, Mark F. Mendenhall, and *J. W. Brooks,* for respondents.

[1]Reported in 175 Pac. 110.

PARKER, J.—The plaintiff commenced this action in the superior court for Walla Walla county, seeking to set aside two deeds of conveyance by Anna B. Steinke to her sons, Walter C. and Berkey E. Farley, conveying to them lands in that county. The plaintiff, being a judgment creditor of Mrs. Steinke, claimed that the deeds were executed in fraud of her rights as such creditor. Trial in the superior court upon the merits resulted in a judgment denying the relief prayed for and dismissing the action, from which the plaintiff has appealed to this court.

In January, 1910, Mrs. Steinke became indebted to John Hendry in the sum of $10,000 for a part of the purchase price of real property situated in King county, then conveyed by him to her, which indebtedness was then secured by her executing a mortgage to him upon the same property. In January, 1914, before the commencement of any action to recover that indebtedness or foreclose the mortgage securing the same, Mrs. Steinke made the conveyances which the appellant seeks to have set aside. A short time following the making of the conveyances, appellant, as executrix of the last will and testament of John Hendry, deceased, commenced an action in the superior court for King county, seeking the foreclosure of the mortgage, and also seeking a deficiency judgment against Mrs. Steinke, in the event the sale of the mortgaged property should not yield sufficient funds to satisfy the indebtedness. Thereafter, in September, 1914, a decree of foreclosure was entered in that action, and in October, 1914, a sale was had thereunder, which left a deficiency of $5,106 in the payment of the indebtedness secured by the mortgage. The decree of foreclosure was not in terms a present personal judgment against Mrs. Steinke, but it directed that, in event the money arising from the sale of the property

under the foreclosure should not be sufficient to pay the indebtedness, the sheriff should specify the amount of the deficiency, and "that plaintiff have judgment against the defendant for such deficiency." We assume that, upon the return of the sale, a personal judgment was then rendered against Mrs. Steinke for the amount of such deficiency, though no formal judgment to that effect was introduced in evidence in this case. However, in April, 1916, an abstract of a judgment in favor of Mrs. Clancy, as executrix, and against Mrs. Steinke, rendered in the superior court for King county for the sum of $5,106, which we assume is an abstract of that judgment, was filed in the superior court for Walla Walla county. Thereafter this action was commenced in the superior court for Walla Walla county, and prosecuted therein upon the theory that the conveyances were made with the intent on the part of Mrs. Steinke and her sons, Walter C. and Berkey E. Farley, to defraud her creditors, and particularly the appellant.

In its last analysis, this case presents only questions of fact, determinable wholly from oral evidence, and the measuring of the credibility of the witnesses testifying upon the trial touching the good faith and *bona fides* of the sale and conveyances made by Mrs. Steinke of the Walla Walla county lands to her sons. The argument of counsel for appellant rests largely upon the fact that the conveyances were made from mother to sons, were made in consideration of debts due from her to her sons, and the claim that the conveyances were made for an inadequate consideration. We have read all of the evidence and have examined all of the exhibits with painstaking care, and to the end that we might have a better understanding of the controversy, this has been done by reading the statement of facts and examining the original exhibits, rather than by de-

pending upon the abstract thereof prepared by counsel. We have given due weight to the fact that these conveyances were made from mother to sons in consideration of debts due by her to them, and the rule calling for critical examination of the circumstances under which such conveyances are made when the rights of creditors are involved. To discuss the evidence in detail here would be but to notice a great number of detail facts and circumstances with a view to determining the credibility of witnesses touching their testimony relative to the amounts actually owing by Mrs. Steinke to her sons, and the value of her equity in the lands, which were heavily incumbered by mortgages and taxes, and which had become much depreciated in value for want of cultivation during two or three years previous to the making of the conveyances. We deem it sufficient to say that we cannot take a different view of the controversy than that entertained by the trial court.

The judgment is affirmed.

MAIN, C. J., FULLERTON, and MITCHELL, JJ., concur.

TOLMAN, J., dissents.

[No. 14709. Department Two. September 24, 1918.]

GE ASBURY, *Appellant*, v. HECLA MINING COMPANY, *Respondent*.[1]

STER AND SERVANT — FELLOW SERVANTS — DIFFERENT EMPLOY-. Under the rule in Idaho, the driver of a mule train in a is not a fellow servant of a timber gang that moved timbers other track, there being no cooperation or association to enhem to exercise mutual influence over each other.

ME—ASSUMPTION OF RISKS—UNKNOWN DANGERS. The driver of e train, having no control over or knowledge of a timber truck ollided with his train, did not assume the risks.

STER AND SERVANT—NEGLIGENCE—COLLISION IN MINE — NOTICE. is sufficient evidence of negligence of the master in a collision en a mule train and a timber truck, where the driver of the could not anticipate that the truck was on the track around ve ahead of him, for months he had passed the place without ntering timber trucks, except once, when the shift boss promim that it would not occur again, and no warning was given

peal from a judgment of the superior court for tane county, Carey, J., entered December 18, 1917, granting a nonsuit, dismissing an action for perl injuries sustained by an employee in a mine. rsed.

ummer & Lavin, for appellant.

nnon & Ferris and *Wakefield & Witherspoon*, for ondent.

OLCOMB, J.—Plaintiff's action is to recover for perl injuries received on October 30, 1916, while driva mule train consisting of seven cars carrying t two tons of ore each, along and upon an teen-inch gauge railway track, in an approximately nile tunnel belonging to the defendant's mine in o. Plaintiff's duty was to stand on a small plat-

[1] Reported in 175 Pac. 179.

form on the front car of the train and drive the mule. The speed of the train was about eight miles per hour. While in the tunnel and at a curve, he discovered a timber truck about fifteen to twenty feet ahead of him on the track. He jumped from the ore train, but one of the timbers on the timber truck struck his right leg and broke it. In the operations of the mine, different gangs of workmen, each under the charge of a shift boss, were engaged at different occupations. The duty of a timberman was to do the necessary timbering in the mine. It was customary to transport timbers on a small timber truck to places where needed, but not to have the timber truck on the track while the track was used for the purpose of hauling ore on the morning and afternoon shifts. Plaintiff had nothing to do with the timber gang. There was no signal system installed, and plaintiff had no warning or notice until the collision that the timber truck was on the track. About twenty minutes before the injury, there was no timber truck on the track, and no timbering was being done in the tunnel when plaintiff came along from the shaft to get this load of ore. The noise of the ore train could be heard at from 1,000 to 1,200 feet distance.

At the commencement of the trial, it was stipulated in open court as follows:

"It is stipulated in open court that there was no workmen's compensation law in the state of Idaho in existence and in force at the time of the happening of the accident referred to in this case, or at the present time, or any other similar law to the law of the state of Washington with reference to workmen's compensation."

At the close of plaintiff's evidence in open court, it was stipulated as follows:

"It is stipulated between counsel for plaintiff and defendant in open court that in place of offering evi-

dence as to what the rule of common law is in Idaho at the time of the happening of this accident, the court may take the decisions of that state and determine for itself, as a matter of law, what the Idaho rule is, which is applicable to this case."

At the close of plaintiff's case, the defendant moved for a nonsuit. The court sustained the motion, discharged the jury and rendered judgment against the plaintiff, from which order and judgment this appeal is taken.

Defendant contends that the timbermen were fellow servants with plaintiff, that plaintiff assumed the risk, and that no negligence was proven against defendant. We shall attempt to apply the law of Idaho with reference to the fellow servant doctrine, and will adopt the definition formulated in *Brayman v. Russell & Pugh Lumber Co.*, 169 Pac. (Idaho) 932, which is:

"Whether or not respondent and the sawyers were fellow servants was, because of the disputed facts in this case, a question to be determined by the jury, and the court instructed it as follows: 'In order to constitute the defendant a fellow servant with the fellers of timber, they must have been employed by the master in some common line of employment, by which employment they would cooperate in the particular business then in hand in the same line of employment, or whose usual duties would bring them into habitual association so that they might exercise mutual influence upon each other promotive of proper caution, but if you find in this case that the plaintiff and the fellers of timber did not associate together in the same common work but were employed in different lines of work, and were engaged in working separately from each other, the one not knowing what the other was doing or how the work was being carried on by him, and nothing of their work in common, and not associating together in performing the work, but acting entirely independent in a different part of the work, they would not be fellow servants under the law, and the defend-

ant could not escape liability for any injury caused by one to the other.' This instruction correctly states the law with respect to what constitutes a fellow servant. *Relyea v. Kansas City, Ft. S. & G. R. Co.,* 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817; *Union Pacific R. Co. v. Erickson,* 41 Neb. 1, 59 N. W. 347, 29 L. R. A. 137; *Illinois Steel Co. v. Ziemkowski,* 220 Ill. 324, 77 N. E. 190, 4 L. R. A. (N. S.) 1161; *Chicago, etc., R. Co. v. Kneirim,* 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259; *Chicago City R. Co. v. Leach,* 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216; *Richardson v. City of Spokane,* 67 Wash. 621, 122 Pac. 330; *Putnam v. Pacific Monthly Co.,* 68 Or. 36, 130 Pac. 986, 136 Pac. 835; *Irwin v. F. P. Gould & Son,* 99 Neb. 283, 156 N. W. 503; 18 R. C. L. 758."

This case does not depart from the principles of *Barter v. Stewart Min. Co.,* 24 Idaho 540, 135 Pac. 68. It was not customary for the timbermen to use the track on the shift that plaintiff was employed on; therefore they could not be working in common and be held as fellow servants. True, they could be working for one master, but this is not the criterion of a fellow servant. In *Barter v. Stewart Min. Co., supra,* the facts were almost identical with the case at bar, except that several collisions had previously occurred. The court refused to direct a verdict in defendant's favor on all their contentions.

The contention of assumed risk is without merit. Plaintiff having no control over the timber truck, he cannot be held to have assumed the risk of which he has no knowledge and which is under the control of the master and a different, independent work.

This question then confronts us: Was it negligence for the defendant to have the timber truck on the track at the time it did without warning to the plaintiff of its presence?

"A master is bound to give a servant, working in a place which may become dangerous, by reason of perils arising from the doing of other work pertaining to the master's business, different from that in which the servant is engaged, such warning of the additional danger as will enable him, in the exercise of reasonable care, to avoid them, and such duty cannot be delegated so as to render the master free from liability for negligence in its performance." 4 Thompson, Negligence, p. 294, § 4069.

Plaintiff could not anticipate, without warning of some kind, that the timber truck was on the track around the curve ahead of him. He had been hauling the ore for months and had passed the place many times a day without previously encountering timber trucks, except once, when the shift boss promised him that it should not occur again. If plaintiff received no warning or notice of the additional danger of the timber truck being on the track, so that he could have guarded against the injury, he could not be held accountable for contributory negligence or assumption of risk. All these were questions of fact for the jury, to be met by competent evidence.

The cause is reversed and remanded for new trial.

MAIN, C. J., CHADWICK, MOUNT, and MACKINTOSH, JJ., concur.

[No. 14773. Department One. September 24, 1918.]

E. D. MINEAH *et al., Appellants,* v. C. E. DUFFY, *as Sheriff of Benton County, et al., Respondents.*[1]

HUSBAND AND WIFE—COMMUNITY DEBT — ACTIONS — JUDGMENT—CONSTRUCTION. Where the complaint in an action to foreclose a mortgage alleged that it was a community debt and the same was admitted by the answers, a deficiency judgment against the husband, who alone signed the note, is not an adjudication that the debt was his separate debt, there being no provision that it was to be executed against his separate property; and community property was subject to it, in view of the whole record and the rule that a judgment against the husband alone is prima facie a community liability.

ESTOPPEL—ASSERTION OF CONTRARY CLAIMS—CHANGE OF SITUATION. A community creditor, who, in actions to set aside fraudulent conveyances, claimed the property conveyed was the separate property of the husband, is not estopped from subsequently asserting that it was community property in a suit to enjoin his execution sale, where he was nonsuited, recovering nothing by his first actions, in which the character of the property was immaterial, since the rights of the parties were not changed or affected.

Appeal from a judgment of the superior court for Benton county, Truax, J., entered May 12, 1917, upon findings in favor of the defendants, in an action to enjoin the sale of property on execution, tried to the court. Affirmed.

M. M. Moulton and *Lon Boyle,* for appellants.

W. H. Wilson and *McGregor & Fristoe,* for respondents.

FULLERTON, J.—In the year 1912, the appellant E. D. Mineah and one F. A. Kennett made and delivered to the respondent M. Z. Donnell promissory notes of the face value of $20,000, and secured the same by mortgages upon real property situated in Benton county.

[1]Reported in 175 Pac. 170.

At the time of the execution of the notes and mortgages, both Mineah and Kennett were married men living with their wives. The wives, while not signing the notes, joined in the execution of the mortgages. The notes were not paid according to their tenor and effect, and a single action was brought to recover thereon and to foreclose the mortgages. In the complaint in the action it was alleged that the obligation for which the notes and mortgages were given was the community obligation of the makers of the notes, and judgment was demanded against the makers of the notes individually and against the communities consisting of the makers and their respective wives. The defendants filed answers to the complaint in foreclosure and, while denying certain allegations of the complaint, expressly admitted the allegation as to the community character of the indebtedness. Judgment was subsequently entered in the action in favor of the plaintiff therein. The judgment, however, made no reference to the community character of the debt. It provided that the plaintiff have and recover "against the defendants F. A. Kennett and E. D. Mineah, and each of them," the amount found due upon the notes, directed a sale of the mortgaged property, and further provided that, in case the proceeds of the sale were insufficient to satisfy the judgment, "the plaintiff have execution for the unpaid portion of said judgment against the property of the defendants F. A. Kennett and E. D. Mineah and each of them." The mortgaged premises were sold under the judgment of foreclosure, bringing a comparatively insignificant sum, leaving a deficiency of something over $17,000.

After the return of the deficiency, the appellants Mineah and wife executed a chattel mortgage to the Prosser State Bank, covering all of their personal property, to secure an indebtedness of $5,000 owing

by them to the bank. At about the time of the execution of the mortgage, the respondent Donnell caused a writ of execution to issue upon the deficiency. Discovering then the chattel mortgage, he brought an action in the superior court, making defendants thereto Mineah and wife and the bank, seeking to have the mortgage set aside and the mortgaged property subjected to sale under his writ of execution. In his complaint he alleged that the mortgage had been executed without consideration and as a result of a conspiracy between the mortgagors and the bank, having for its purpose the cheating and defrauding of the plaintiff and preventing the collection of his deficiency judgment. The complaint also contained the further allegations:

"The said chattel mortgage includes all of the property of the said defendants, other than the Prosser State Bank, which might at that time or at any time since said date have been levied upon under said execution, and the said mortgage was given for the purpose of cheating and defrauding the plaintiff and defeating and rendering fruitless his attempt to levy upon the said mortgaged property for the purpose of satisfying his said judgment; that the defendants E. D. Mineah and Carrie V. Mineah at that time owned, and still own, a large amount of other property not subject to levy under said execution, but which would have been ample security for any indebtedness which they, or either of them, or any of the defendants might have owed to the Prosser State Bank, but that no other property of the said defendants, or any of them, was given as security to the said Prosser State Bank, except as hereinbefore stated, namely, the property and all of the property which legally was subject to the levy of the plaintiff under his execution upon said judgment."

To the complaint the defendants therein filed separate answers, denying generally the allegations of the complaint. The evidence offered at the trial was di-

rected towards establishing allegations of the complaint, the plaintiff proceeding on the theory that the deficiency judgment was the separate obligation of R. D. Mineah and not the community obligation of Mineah and wife. At the conclusion of the evidence of the plaintiff, the trial court granted a motion of nonsuit, holding the evidence insufficient *prima facie* to justify a recovery.

At about the time of the commencement of the last mentioned action, the respondent instituted a proceeding in garnishment against the Prosser State Bank and one E. A. Parlett, the object of the proceeding being to reach the money realized by Mineah and wife from the chattel mortgage executed by them to the bank. In this proceeding the allegations in the affidavit concerning the property of the Mineahs were substantially the same as in the action mentioned, and it was stipulated that the evidence in that case should be considered as evidence in the proceeding. At the conclusion of the proceeding, the writ of garnishment was quashed.

After the failure of the foregoing proceedings, the respondent caused execution to be levied upon the community real property of the appellants Mineah and wife. The appellants thereupon began the present action to enjoin the sale, setting up in an amended complaint the deficiency judgment in the foreclosure proceedings, averring it to be the separate obligation of E. D. Mineah and not the community obligation of Mineah and wife; also setting up the proceedings theretofore instituted to collect the judgment, averring that the respondent was thereby estopped to assert the community nature of the judgment, if it was in fact a community obligation. Issue was taken on the complaint and a trial had, resulting in a judgment to the effect that the deficiency judgment was the community

obligation of E. D. Mineah and Carrie V. Mineah, his wife, and enforceable out of the separate property of E. D. Mineah and the property of the community consisting of himself and wife. This appeal is from the last mentioned judgment.

It is the appellants' first contention that the judgment sought to be executed upon their community property is, in legal effect, the separate obligation of the appellant E. D. Mineah. It is not denied that, in this jurisdiction, a judgment against the husband alone is *prima facie* a community liability, nor is it denied that such a judgment may, in a proper proceeding, be conclusively established as a judgment against the community. But it is contended that this judgment does not fall within the general rules because of the somewhat peculiar condition of the record. From the statement it will be seen that the respondent in the foreclosure action alleged in his complaint the community character of the obligation sued upon; that the appellants, in their answer, admitted the allegation; that the court made no finding on the question, and in entering its judgment expressly provided that the deficiency remaining after the foreclosure sale could be executed upon the property of E. D. Mineah, without providing that it could be executed upon the community property of E. D. Mineah and wife. It is argued that this is in effect an adjudication that the judgment is the separate obligation of the husband; that a party to an action must make the most of his day in court, and, when he takes a judgment limited in form when he might have had a broader judgment, he is thereafter concluded by the judgment as written. But we think this an erroneous view of the effect of the judgment. The judgment is not limited in form. While it provides that, if upon the return of the sale of the mortgaged property a deficiency remains, the

respondent may have judgment against the appellant E. D. Mineah, it is not provided that the judgment must be executed against his separate property, or that the community property of himself and wife shall be exempt from such an execution. At most it was in form an inconclusive judgment, in so far as community property was concerned; that is to say, the community property of E. D. Mineah and wife was only *prima facie* subject to execution under it. Since we may examine the entire record to discover the scope and effect of a judgment as to its community character, and since the record shows that the obligation on which the judgment was founded was confessedly a community obligation, plainly the court did not err in holding the appellants' community property liable to its satisfaction.

The further contention is that the respondent is estopped by his acts in the subsequent proceedings brought to enforce collection of the judgment from now asserting the community character of the judgment. But we think this claim also untenable. The respondent in these proceedings asserted the separate character of the obligation contrary to his present claim and it may be that, had he obtained property of the appellants by reason of such assertion to which he would not otherwise have been entitled, equity and good conscience would not permit him to assert the contrary for the purpose of obtaining other property, at least without a surrender of his gains. But in those proceedings he was nonsuited. He gained nothing and was mulcted in costs. The assertion of a separate character of the judgment was not even necessary to the maintenance of his cause of action. Had he proved his allegations as to the fraudulent nature of the chattel mortgage he sought to set aside, the property he attempted to reach would have been subject to execu-

tion under the judgment whether it be a community or a separate judgment. We have, therefore, nothing more than an erroneous assertion in a legal proceeding of the character of a judgment. This did not change its scope or affect the rights of the parties thereunder. These are determined by the judgment itself, and remain fixed, whatever may be the contentions of the parties with relation thereto.

We conclude that the judgment appealed from should stand affirmed, and it is so ordered.

MAIN, C. J., PARKER, MITCHELL, and TOLMAN, JJ., concur.

[No. 14799. Department Two. September 24, 1918.]

IDA A. WATERMAN, *Plaintiff*, v. FREDERICK C. ROBERTSON *et al., Defendants.*[1]

ATTORNEY AND CLIENT—AUTHORITY TO BEGIN SUIT—EVIDENCE—SUFFICIENCY. An action of unlawful detainer to recover leased premises, upon which the tenant had erected valuable improvements, must fail for want of the attorney's authority to commence it, where the lessees were absent from the state, and endeavored in good faith by telegraph to make an adjustment of a bona fide dispute for taxes, and the plaintiff's attorney, whose only authority at the time was to consider the adjustment and wire advice, took advantage of the lessees' absence and precipitated the unlawful detainer suit, after three days' notice by mailing and leaving copies on the premises.

Cross-appeals from a judgment of the superior court for Spokane county, C. C. Upton, judge *pro tempore,* entered July 9, 1917, upon findings in favor of the plaintiff, in an action of unlawful detainer, tried to the court. Reversed.

Carl L. Shuff and *Roy A. Redfield,* for plaintiff.

Robertson & Miller and *Cordiner & Cordiner,* for defendants.

[1]Reported in 175 Pac. 177.

HOLCOMB, J.—This is an unlawful detainer action brought by plaintiff, owner in fee simple of the west half of lots 1 and 2, block 1, Havermale's addition to the city of Spokane. Defendant Frederick C. Robertson is a tenant as assignee under a written lease for a term from September 1, 1911, to September 1, 1941. Under the conditions of the lease, lessee agreed to erect upon the demised premises a three-story building with basement, which is to become the property of the lessor at the termination of the lease. For the first five years of the lease the lessee agreed to pay an annual rental of $4,200, payable in monthly installments in advance; for the second five years an annual rental of $4,800, payable in monthly installments in advance; and for the balance of the term, five per cent of the fair market value of the premises, excluding buildings and structures, the fair market value to be determined before the end of the first quarter of the years beginning September 1, 1921, and September 1, 1931, respectively. Defendant constructed the three-story brick building with basement at a cost of $50,000, plaintiff admitting the value of same to be $36,000. A dispute arose between the lessor and lessee as to which of the parties should pay the taxes on the demised premises. Mr. Shuff, in plaintiff's behalf and with her money, paid the delinquent taxes on April 10, 1916, and paid the current taxes on July 15, 1916, aggregating $3,945.

The plaintiff lives in Providence, Rhode Island. The defendant, while in Washington, D. C., on an eastern trip, on July 8, 1916, wired the plaintiff's mother, which telegram was received by plaintiff and is as follows:

"Mrs. Julia Anthony, Providence, R. I.

"Wire me Prince George Hotel New York if you will confer with me Providence Monday as I will come.

Want to avoid any litigation and either bu(r)y or make satisfactory adjustment. If you want to sue will insist on construction of lease. I have not and will not forfeit this lease and want amicable adjustment.

"Fred W. Robinson."

On July 9, 1916, plaintiff wired as follows:

"Fred W. Robertson,
"Prince George, New York, N. Y.
"Matter in hands of C. L. Shuff, Spokane. Make your proposition to him. (Mrs.) I. A. Waterman."

Defendant wired from New York, July 9, 1916, as follows:

"Mrs. I. A. Waterman,
"Providence, R. I.
"Your telegram received. Wired my office today and arrange purchase if possible. Also wrote you fully my position today. I earnestly desire a satisfactory adjustment. Please notify Schuff.

"Fred C. Robertson."

The defendant, before going east, had failed to pay the rent for the months of February, March, April, May and June, 1916, aggregating $1,750. On July 15, 1916, service was made of an unlawful detainer notice, which, after omitting description, is:

"Notice.

"To Frederick C. Robertson and Marie T. Robertson, his wife:

"You and each of you are hereby notified that you are in default for the months of February, March, April, May and June, in payment of rent for that property described as: . . .

"And that the total amount of rent now delinquent and overdue from you to the undersigned is the sum of seventeen hundred and fifty dollars ($1,750). You are further notified that the undersigned owner requires in the alternative, either that you pay the said rent to the said owner through her undersigned attorneys, or that you surrender the said premises and pos-

session thereof to said owner through her undersigned attorneys, within three days after the service of this notice upon you. Ida A. Waterman, Owner,
"By C. L. Shuff,
"Roy A. Redfield, Her Attorneys."

Service of the notice was made by leaving copies on the detained premises with suitable persons, by posting there and mailing to each of defendants Robertson and wife to their Spokane house at West 1721 Riverside avenue. Mr. Robertson was still absent on his eastern trip, while Mrs. Robertson was at their summer place, Spirit Lake, Idaho. Possession of the premises was not yielded, nor was payment of the rent in arrears made during the three-day interval, nor at all.

The complaint in the unlawful detainer action was filed on July 20, 1916, and summons issued thereon on the same date. Defendants Robertson and wife and defendants Connors appeared, while the other defendants, being subtenants, defaulted. The defendants Connors are mortgagees of the leasehold. There is no dispute as to the relation of landlord and tenant. Plaintiff did not offer or introduce in evidence the unlawful detainer notice, which was filed with the clerk of the court. At the close of plaintiff's case, defendants challenged the sufficiency of plaintiff's evidence to entitle her to recover, and moved that her action be dismissed on the ground that she had failed to prove that an unlawful detainer notice had been served on the defendants Robertson. On July 9, 1917, the court entered judgment in favor of the plaintiff for $3,500, or double the amount of rent found due; for $2,400.08 taxes, being that part which the court found that defendants covenanted to pay under the lease, and canceled and forfeited the lease.

The defendants assign that the court erred, (1) in

not dismissing plaintiff's action with prejudice; (2) in not permitting the defendants Robertson to prove that plaintiff waived the right to maintain an unlawful detainer action; (3-5) in entering a judgment against either the defendant Robertson or the community consisting of Robertson and wife for the sum of $2,400.08, or any other sum, for the taxes, for the sum of $3,500 as rent, or any other sum or at all, and canceling the defendants' lease on the demised premises.

Disregarding all other claims of error on the part of both the parties as of little or no merit in law, we pass at once to the matter which we consider vital and fatal to the action. Defendants at all times challenged the authority of plaintiff's attorneys to institute and maintain this action.

Defendants contend that the attorneys for the plaintiff had no authority to commence an unlawful detainer action. Mr. Shuff, one of plaintiff's attorneys, admitted that he received and acknowledged the following telegram:

"Providence, R. I., July 715 P 9, 1916.
"C. L. Shuff, O1111 Hollis St., Spokane, Wn.
"Following from Robinson to Mrs. Anthony. Wire me Prince George Hotel New York if you will confer with me Providence Monday as I will come. Want to avoid any litigation and either buy or make satisfactory adjustment. If you want to sue will insist on construction of lease. I have not and will not forfeit this lease and want amicable adjustment. Fred W. Robinson. Have answered. Matter in hands of C. L. Shuff. Make your proposition to him. Wire advice at once, 159 Medway Street. C. F. Whitney."

Whitney was representing Mrs. Waterman at Providence, Rhode Island. Whatever authority the attorneys had prior to the receiving of the above telegram was revoked or suspended by it until Mr. Robertson

could be advised, and the authority of the attorney or attorneys for plaintiff was then only to negotiate with Robertson for a settlement or sale. Good faith required that the attorneys should wait with the action for their client until they either notified or consulted with Mr. Robertson. They did neither, but by their action precipitately verified the complaint in behalf of the plaintiff when they knew that Robertson was in the east and his wife out of the city. While it is true that defendants were delinquent and apparently dilatory in the payment of rent and taxes, the dispute about the provisions relating to the payment of the taxes had existed for years. Those parts of the lease relating to the payment of taxes are paragraphs 7, 8 and 18 of the lease, and read as follows:

"(7) The lessor covenants and warrants that she has title in fee simple to said demised premises free and clear of any and all encumbrances and liens of any and all descriptions whatsoever, and agrees to pay, before the same become delinquent, all sewer, paving, curbing and all other taxes, levied on or against said demised premises, excepting such taxes as are hereinafter expressly provided for.

"(8) The lessee covenants and agrees to pay, before the same become delinquent, the sidewalk taxes and all regular county and city taxes lawfully levied and imposed on demised premises and buildings thereon, including chattels and permanent improvements thereon belonging or erected by said lessee, excepting those taxes in the preceding paragraph providing for.

"(18) It is further understood and agreed that if the lessor does not pay the assessments and taxes levied and assessed on said premises, which by the terms of this indenture she is to pay, the lessee may pay the same and deduct the amounts so paid, and also the necessary costs and expenses incurred by lessee therein, from the rental sums to be paid by the lessee to the lessor."

Defendants contended that they were required to pay only the taxes as set forth in paragraph 8 of the lease, while plaintiff contended that the defendants were required to pay all the general taxes, contending that the "regular county taxes" meant all the taxes payable to the county treasurer. Negotiations had been in progress to amicably settle the difference between the parties. During such negotiations, and while defendants were lulled into a feeling of safety and settlement and the principal defendant was away from Spokane, the attorneys for plaintiff knowingly took advantage of them by service of the notice and filing a complaint as indicated. Although the proceedings seem regular on their face, it cannot be said that the facts are such as to entitle the plaintiff's attorneys to bring the action at the time and under the conditions they did. To so hold would be an unconscionable wrong. Appellants would not only be doubly penalized for the delinquent rent, and the costs, but also forfeit the lease and lose a very valuable building for the unexpired term.

Plaintiff also appeals for the reason that the court apportioned the taxes against defendants only for the county and city levies, while she claims that she is entitled to recover for all the general tax levies. In view of the fact that we must dismiss the action, we will not discuss this phase of the action, but leave the parties to bring such action or make such adjustment as they may be advised.

Reversed and remanded for dismissal.

MOUNT and MACKINTOSH, JJ., concur.

CHADWICK, J. (concurring)—It should not be understood that the court is reversing this case as a matter of equity, or because to affirm it would result in an un-

conscionable wrong. It is an action at law, and if the law be that plaintiff is entitled to recover, it should be so declared.

I concur in the result for the reason that the authority to begin the action is to be determined by reference to the law of agency. At the time the action was begun, the authority of plaintiff's attorneys was limited. They had authority to negotiate, but no authority to begin an action until the negotiations had come to naught. I think this is clearly indicated by the telegram of July 7, 1916.

MAIN, C. J., concurs.

[No. 14812. Department Two. September 24, 1918.]

A. D. WILLIAMS, *Appellant*, v. THOMAS B. MOORE, *Respondent*.[1]

FRAUD—MISREPRESENTATIONS—ACTION FOR DAMAGES—EVIDENCE—SUFFICIENCY. In an action for damages for fraudulent representations, findings for defendant are sustained where there was evidence that the representations were made in good faith, and were not relied on by the plaintiff, who made his own investigation.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered November 3, 1917, upon findings in favor of the defendant, dismissing an action for damages for fraud. Affirmed.

Danson, Williams & Danson (*George D. Lantz*, of counsel), for appellant.

E. O. Connor, for respondent.

[1]Reported in 175 Pac. 172.

MOUNT, J.—In the fall of 1915, the plaintiff and the defendant made an exchange of certain properties. As a part consideration for the exchange, the defendant assigned to the plaintiff a claim against the Seattle-Alaska Anthracite Coal Company for $2,080.27. This claim was not paid by that company, and afterwards this action was brought to recover damages on account thereof. The plaintiff alleged, in substance, that the defendant represented to the plaintiff that the Seattle-Alaska Anthracite Coal Company was not indebted in any other sum and paid all its bills each month; that the plaintiff believed these representations and relied thereon and was thereby induced to take the claim; that the statements so made were false, and known to be false by the defendant at the time they were made; that afterwards the coal company became insolvent and a receiver was appointed therefor. These allegations were denied, and the case was tried by the court without a jury. At the conclusion of the trial the court found,

"that the said plaintiff did not rely upon the defendant's representations, but made an independent investigation of the said claims and affairs of the said company, and that the said plaintiff has failed to make a case herein and failed to show fraudulent representations, and the said plaintiff cannot recover herein."

Upon this finding the trial court dismissed the action. The plaintiff has appealed.

The point made by the appellant is that the court was in error in finding that the appellant made an independent investigation of the responsibility of the Anthracite Coal Company. This question is entirely one of fact depending upon the truthfulness of the witnesses. The court, no doubt, based his conclusions upon not only what they said, but upon their demeanor and appearance upon the witness stand. We think it

is apparent from the record that the representations made by the respondent with reference to the claim were made in the utmost good faith. There is also evidence in the record which shows that, after the representations made by the respondent, the appellant visited the president of the Anthracite Coal Company, who informed the appellant that the claim was a valid one and would be paid in due course. If the court believed this testimony the finding was correct. After an examination of the evidence, we are not convinced that the trial court was wrong in making this finding.

The judgment appealed from is therefore affirmed.

MAIN, C. J., CHADWICK, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14833. Department Two. September 24, 1918.]

LILLIAN M. FRIEDMAN, *Respondent*, v. W. F. PADMORE *et al.*, *Appellants*.[1]

CORPORATIONS—STOCK—SALE—CONTRACT — CONSTRUCTION. Where plaintiff sold 10,000 shares of capital stock to defendant, by contract providing that 3,000 shares were to belong to the buyer on payment of $2,500, and same was to be pledged to secure the performance of the buyer's agreement to save the seller harmless from her indebtedness to the company on account of advancements of future dividends, and the balance, 7,000 shares, to be placed in escrow until paid for, and all except the 3,000 shares to be fully forfeited as liquidated damages in case of default in payments, it was not intended to require a payment of the advances made in any event, but only to save harmless therefrom if the contract be fully performed; and the contract having been forfeited by the seller as to the 7,000 shares for defaults, it carried its own measure of damages in the sums paid and forfeited, and the seller cannot recover anything in addition, the 7,000 shares being burdened for advances as if no contract had been made.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered December 24, 1917,

[1]Reported in 175 Pac. 163.

in favor of the plaintiff to foreclose a pledge, tried to the court. Reversed.

Voorhees & Canfield, for appellants.

A. E. Barnes, for respondent.

CHADWICK, J.—The respondent and two others were the owners of the capital stock of the Cascade Laundry Company, a corporation doing business in the city of Spokane. The company was a going concern, but had never formally paid any dividends. It had, however, advanced money to the stockholders from time to time as their necessities required.

Respondent owned 10,000 shares of the stock. At a meeting of the stockholders held on October 7, 1914, respondent being present with the others, a resolution was passed in which the several advancements were ratified and confirmed, and the policy of the company to continue its practice was declared. The resolution further recited:

"Whereas, it is the intention of all parties concerned that said amounts so advanced shall be considered as payments out of the dividends to be derived from the company, now, therefore, be it resolved, that all advances heretofore and hereafter made to F. G. Meeks, W. J. Doust and Mrs. Friedman shall be considered to be made on account of dividends to be paid by the company, and that when a dividend or dividends shall be declared, the amounts theretofore advanced to them as aforesaid shall be deducted therefrom."

On the 31st day of May, 1915, respondent entered into contract with the appellant for the sale of her 10,000 shares of stock. At this time she had received advancements aggregating $2,061.43. The contract was in writing, and it was agreed that the purchase

price was to be $8,500, and that the defendants would save respondent

"—harmless in respect of that certain indebtedness hereinbefore mentioned owing by the party of the first part to the Cascade Laundry Company, in the sum of $2,061.43, on account of advancements of future dividends upon said stock, and to secure the full and faithful performance of said guaranty, the said certificate for 3,000 shares shall be and remain a pledge to insure the performance thereof. The remaining certificate for 7,000 shares shall not pass to the party of the second part until all sums and interest thereon have been fully paid.

"That the certificates of stock shall be deposited and remain with the agreement until the full performance or breach of the contract. The said certificate for 3,000 shares shall become the property of the party of the second part after the payment of $2,500 in cash has been made, but subject always to the pledge of said certificate and said shares as a guaranty as against the said sum of $2,061.43 as aforesaid."

The contract further provides that, in case of default in any of the terms and conditions, the remaining 7,000 shares of stock should revert to and become the property of the respondent, and that all sums paid should be forfeited as liquidated damages, "except said certificate of 3,000 shares."

The stock was represented in a single certificate for 10,000 shares. During the negotiations and before they were concluded, the parties made and signed an additional memorandum:

"(B) For the purpose of modifying the original agreement it is hereby agreed that the party of the first part shall endorse her certificate for 10,000 shares to W. F. Padmore and put the same in escrow, and whenever the party of the second part (Padmore) shall desire so to do, the said certificate of 10,000 shares of stock shall be apportioned in accordance with paragraph 5 of the original agreement. This agree-

ment is intended only for a temporary expedient until they desire to turn over a portion of said certificate to the party of the second part."

The contract and the memorandum modifying it, together with the certificate for 10,000 shares and six promissory notes to be paid one each year following until the whole purchase price was paid, were deposited in escrow in the Old National Bank at Spokane. The parties subscribed to the following memorandum indorsed on the envelope containing the escrow:

"From—Lillian M. Friedman. Residing at—918 So. Lincoln St., Spokane, Wash. To—W. F. Padmore. Residing at—Spokane, Wash. Conveying the following described property: 10,000 shares of the capital stock of the Cascade Laundry Co. This envelope also contains six $1,000 notes. Deliver inclosed papers to W. F. Padmore upon final payment to you of the sum of $6,000 in the amounts and at the times stated, as follows: $1,000 June 1st, 1916; $1,000 June 1st, 1917; $1,000 June 1st, 1918; $1,000 June 1st, 1919; $1,000 June 1st, 1920; $1,000 June 1st, 1921. Interest at 7 per cent; payable annually. In the event of failure to pay any sum or sums within periods stated for such payment, you are hereby authorized to at once return all papers to Lillian M. Friedman, upon demand, and all sums already paid shall be forfeited to the grantor as liquidated damages.

"These papers are left with you in escrow; and it is hereby understood and agreed that you are released from any and all claims whatsoever that may be made upon you; except as to the delivery of money and papers as above directed. Lillian M. Friedman,

"Spokane, Wash., 6-15-15. W. F. Padmore."

On the same day, appellant paid respondent the sum of $2,500 in cash. The matter was attended to for respondent by her son-in-law, who was a witness to the contract and the memorandum modifying it.

Respondent, who had been a trustee and officer of the corporation, resigned at that time and appellant

W. F. Padmore became an active participant, if not the real manager, of the company. On August 24, 1915, the trustees of the company passed a resolution in part as follows:

"The said 10,000 shares of stock belonging to Lillian H. Friedman being encumbered upon the books by a charge of $2,061.43 advanced to her to be charged as against any dividends which might accrue to said stock as provided for in the minutes of the meeting of stockholders held on October 7th, 1914, it is agreed and understood that said W. F. Padmore in acquiring the same takes said stock subject to the liability of any dividends therefrom to be first applied upon said book charge, and that said charge be continued against said stock, and that as to Lillian H. Friedman said book charge be now closed and discharged."

Respondent's account was closed and carried over under the name of W. F. Padmore. Padmore testifies that he took this resolution to respondent and that he exhibited the minutes of the meeting of the trustees, and it was agreed between them that the certificate for 10,000 shares of stock should be redelivered by the bank and that the company should reissue two certificates, one for 7,000 shares and one for 3,000 shares, as contemplated in the original agreement. Respondent denies that there was any such understanding; but however that may be, we are convinced from a reading of the entire record that respondent is mistaken, for on the next day her son-in-law, who seems to have been active in the management of this affair, went with Padmore to the bank and the stock was taken out and split into certificates, the one for 3,000 shares being retained by Padmore, and the other, for 7,000 shares, being redeposited as an escrow.

In addition to the $2,500, appellants have paid $431.50, and respondent received a dividend thereafter declared in the sum of $562.25. Appellants had also

paid $225 on account of interest, but from our view of the case this item becomes immaterial.

Appellants having defaulted on the payment of the first of the $1,000 notes due at the bank, respondent gave written notice of forfeiture and took the papers out of the bank, giving the following receipt:

"10-28-16, received enclosed certificate No. 36 for 7,000 shares Cascade Laundry Company stock. Escrow closed by forfeiture. Lillian M. Friedman."

On January 15, 1917, the bank delivered the six notes aggregating $6,000 to appellant W. F. Padmore, taking a receipt as follows: "1-19-17, received six notes aggregating $6,000. W. F. Padmore." In February, 1917, the Cascade Laundry Company declared a dividend of 6 per cent, which amounted to $420 upon the 7,000 shares of stock then owned by respondent. The company refused to pay this dividend in cash to respondent, whereupon she brought this action to foreclose the pledge which had been made between the parties in the first instance. The court found that there was due respondent the sum of $1,548.70, together with interest from the first day of January, 1917, at the rate of 8 per cent per annum.

We have been unable to ascertain from the record or from respondent's brief just how the court arrived at these figures, for it is clear that, under respondent's theory of the case, there could have been no more than $1,067.78 due at the time.

It is the theory of respondent that appellants agreed to pay $2,061.43 in any event, while it is the theory of appellants that they were to receive a certificate for 3,000 shares of the stock and save respondent harmless from any liability arising out of the advancements. That appellants were to have 3,000 shares upon the payment of $2,500 is clear from a reading of the entire contract. The contract fixes the penalty in case

of default in the performance of the contract treated as an entirety. It is:

"That whenever default in the payment of any of the different sums specified herein and the interest as provided by this contract is made, the fact thereof shall forfeit this contract and all sums theretofore paid hereon, and all stock as herein provided shall be fully forfeited to the party of the first part as liquidated damages, except said certificate of 3,000 shares."

It follows that, although the parties had agreed that the certificate for 3,000 shares should stand as a pledge for the performance of the whole contract, it was within their power, and they so contracted, that, if the whole contract was not performed, the damages which would follow would be measured finally and forever by the sums paid in the performance of the whole contract. In other words, the charge against the stock now owned by respondent would be released *pro tanto* to the extent of the payments made by appellant, and she would take the 7,000 shares as if no contract had ever been made.

Our construction of the contract is that it does not call for a payment of $2,061.43 in money in any event, but is a contract only to save respondent harmless of the possibility of having to repay the company for the money it had advanced if the contract had been performed, and that the contract having been forfeited and carrying its own measure of damages, respondent cannot now recover anything in addition to the amount paid by appellants, and that her remaining stock is burdened as if no contract had been entered into.

The decree of the lower court is reversed, with directions to enter a decree of dismissal.

MAIN, C. J., MOUNT, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14643. Department Two. September 25, 1918.]

AUSTIN E. MILLER, *Appellant*, v. LUELLA B. MILLER, *Respondent*.[1]

DIVORCE—ALIMONY—ENFORCEMENT—CONTEMPT PROCEEDING—TITLE—PARTIES. A proceeding to enforce a decree for alimony by means of notice and commitment for contempt in case of default, is not an independent contempt proceeding to be prosecuted in the name of the state, but is properly entitled in the divorce case.

APPEAL—REVIEW—EVIDENCE. In the absence of the evidence on appeal, it will be assumed that there was ample to sustain an order for the payment of alimony, made on oral testimony.

DIVORCE — ALIMONY — PROPERTY SETTLEMENT — POWER OF COURT. Under Rem. Code, § 988, the court may make an order for alimony for the welfare of the children, even though the parties made a property settlement prior to the divorce.

Appeal from an order of the superior court for Spokane county, Oswald, J., entered October 18, 1917, adjudging the plaintiff to be in contempt of court and ordering the payment of alimony, after a hearing upon a show cause order. Affirmed.

J. S. McDonald, for appellant.

Charles P. Lund, for respondent.

MOUNT, J.—This appeal is from an order of the lower court requiring the appellant to pay alimony in a divorce case, and, in default thereof, ordering him to be committed to the county jail until the order is complied with.

It appears that, in the year 1917, the appellant brought an action in the superior court of Spokane county to procure a divorce from the respondent. The respondent appeared in that action and procured an order requiring the appellant to pay into court the sum of $50 for suit money and $15 per month for the

[1]Reported in 175 Pac. 295.

support of a minor daughter. The appellant paid the suit money, and thereafter refused to pay the alimony. Subsequently, on application of the respondent, the court entered an order requiring the appellant to appear and show cause why he should not be punished for contempt for failure to comply with the order to pay alimony. Appellant appeared to that show cause order, a hearing was had upon oral evidence, and the court adjudged the appellant in contempt and ordered him committed to the county jail until the sum of $75 alimony was paid.

The appellant argues that the court was without jurisdiction to enter the order for contempt, because the show cause order did not run in the name of the state of Washington. He also argues, in the same connection, that the court erred in finding him guilty of contempt, because the proceeding was not a contempt proceeding. The points here raised were decided in *Poland v. Poland,* 63 Wash. 597, 116 Pac. 2. In that case we said:

"It has long been the established practice in this state, in seeking the enforcement of alimony decrees, to entitle the proceeding in the original action, and such practice has been recognized in this court in *Holcomb v. Holcomb,* 53 Wash. 611, 102 Pac. 653, and *Metler v. Metler,* 32 Wash. 494, 73 Pac. 535."

In the case of *McGill v. McGill,* 67 Wash. 303, 121 Pac. 469, we said:

"It is urged that the proceeding, being for a contempt, could, under Rem. & Bal. Code, § 1054, be prosecuted only in the name of the state. It is a sufficient answer to say that this is not a proceeding for an independent contempt such as contemplated by the statute. The statutory proceeding is, in its nature, an original criminal proceeding, in which the sole subject of inquiry is the contemptuous conduct charged. The proceeding here arose in the exercise of the in-

herent power of a court of equity to enforce its decrees. It was in aid of the jurisdiction acquired in the original action, which continues so long as there is a minor child whose maintenance was provided for in the decree. The proceeding was, therefore, properly entitled as in the original action to which it is referable for the court's jurisdiction. This is no longer an open question."

The same was also held in *In re Anderson*, 97 Wash. 683, 167 Pac. 70, and in *Wright v. Suydam*, 79 Wash. 550, 140 Pac. 578.

Appellant next argues that the court erred because there was a showing that he did not have funds and ability to pay the alimony. The order shows that it was made upon oral testimony taken at the hearing. The evidence is not brought here, and we must assume, therefore, that there was ample evidence upon which the judgment was based.

Appellant next argues that, because the parties had agreed to a property settlement prior to the time of the divorce, the order to pay alimony avoided that settlement. Even if there was a settlement of the property interests of the parties prior to the bringing of the action for divorce, the court, under Rem. Code, § 988, had authority to make, and by attachment enforce, orders for the welfare of the children.

We find no error in the record.

The judgment is therefore affirmed.

MAIN, C. J., CHADWICK, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14673. Department One. September 25, 1918.]

J. J. MARISCHAL, *Appellant*, v. WINSLOW LUMBER COMPANY, *Respondent*.[1]

BROKERS—AUTHORITY TO MAKE SALE—COMMISSIONS — EVIDENCE—SUFFICIENCY. Where a broker, making a sale subject to confirmation, telegraphed explicit terms based on a price list of a certain date, specially mentioning part at less than list, which was accepted by telegraph, he had authority to close the particular sale, notwithstanding that, two hours before closing the formal contract, he received through the mails an amended price list advancing prices over the list on which the sale was made; and he was therefore entitled to his commissions.

Appeal from a judgment of the superior court for Stevens county, Gilliam, J., entered November 12, 1917, upon findings in favor of the defendant, in an action for a broker's commission, tried to the court. Reversed.

Fabian B. Dodds and *Hamblen & Gilbert*, for appellant.

F. Leo Grinstead and *Samuel R. Stern*, for respondent.

FULLERTON, J.—The respondent is engaged in the business of manufacturing and selling lumber and other timber products. To facilitate its sales, it issues from time to time price lists which it places in the hands of brokers, authorizing such brokers to sell its products to responsible parties in accordance with the prices named in such lists, agreeing to pay stated commissions on all such sales. The appellant is a broker engaged in the business of selling lumber and lumber products on commission. He was given such a list

[1]Reported in 175 Pac. 292.

bearing date February 1, 1915, and authorized to make sales in accordance therewith. On October 15, 1915, the respondent sent to the appellant the following letter:

"Orin, Wash., Oct. 15, 1915.
"J. J. Marischal Lumber Co.,
"Lindell Block, Spokane, Wash.
"Gentlemen: We are enclosing our stock sheet as of Oct. 1st. Until further notice we will fill your orders from responsible parties at the following discounts from list of Feb. 1st, 1915:
"Dimension, $6.00 off.
"No. 2 Com. 6" 8" & 10", $4.50 off.
"No. 2 Com 12", $5.00 off.
"No. 3 Com. 6-8-10 & 12", $4.00 off.
and allow you a commission of 50c per M.
"Very truly yours,
"Winslow Lumber Co.,
"By B. F. Pierce."

On November 16, 1915, the appellant, then being in Denver, Colorado, sold to the Colorado Continental Lumber Company, a dealer at that place, subject to the respondent's confirmation, forty carloads of lumber at prices in accordance with the respondent's lists. On the same day he sent to the respondent the following telegram:

"10 P. M.
"Denver, Col., 11-16-15.
"Winslow Lumber Co.,
"Colville, Wash.
"Have sold Continental Tie and Lumber Co. here forty cars lumber at prices your letter October fifteenth with lath fifty cents off and number four boards two dollars off. Sixty per cent of Order Boards balance dimension. Specifications for five cars next week, balance guaranteed within sixty days. Wire confirmation tomorrow morning sure, Oxford Hotel. They have same offer but giving me preference providing prompt confirmation. J. J. Marischal."

Two days later he received the following reply:

"Colville, Wash., 205P Nov. 18, 1915.
"J. J. Marischal,
"Oxford Hotel, Denver, Colo.
"Order OK but must conform to stock on hand.
"Winslow Lbr. Co."

Upon receipt of the latter telegram, the appellant, on behalf of the respondent, entered into a formal contract with the Colorado Continental Lumber Company for the lumber mentioned in the telegram, in accordance with the prices contained in the lists of February and October of 1915. Some two hours prior to the time the formal contract was entered into, but subsequent to the time he had received the confirmatory telegram, the appellant received through the mails from the respondent an amended or new price list advancing the price of lumber fifty cents per thousand feet over the lists under which the sales were made. Later on and after the contract had been entered into and after he had left Denver, he received a telegram from the respondent to the effect that the sale must be made in accordance with the new price list. Some three days later the respondent also wired the Colorado company, saying it could not accept the order, as the prices on pine board and dimension lumber were fifty cents lower than it had understood the prices were to be, and refused, on a later demand, to carry out the contract. The Colorado company sued the respondent as for a breach of the contract, in the district court of the United States for the eastern district of Washington, and recovered therein the principal sum of $526.40, and the sum of $40.85 as costs. In that action the respondent paid its counsel $308.85.

The appellant instituted this action to recover the commission claimed to have been earned by the execution of the contract of sale with the Colorado com-

pany. The respondent denied liability, and counterclaimed with the judgment entered against it in favor of the Colorado company. The action was tried by the court sitting without a jury, which found that the appellant, in entering into the contract for the sale of the lumber, had exceeded his instructions and had acted in bad faith; and not only denied recovery of the commission, but allowed a recovery in favor of the respondent for the amount of the judgment recovered by the Colorado company, with costs and the attorney's fees expended in defense of the action, the total aggregating $876.05. From the judgment so entered, this appeal is prosecuted.

The finding of the trial court that the appellant acted in bad faith in entering into the contract of sale with the Colorado corporation has its foundation in the fact that the contract was entered into after the appellant had received the price list advancing the scale of prices for the respondent's products, evidently on the theory that this was notice of the possibility of a mistake sufficient to require further inquiry. But it seems to us that it furnishes no basis for the conclusion. The appellant's telegram announcing the sale and asking for confirmation was clear and explicit. It not only gave a general outline of the amount and character of the lumber sold, but it specially mentioned the price list under which the sale was made, specially mentioning also that lath and number four boards were sold at less than the prices listed thereon. When, therefore, the respondent replied, authorizing the contract, the appellant had the right to assume that it had given heed to the wording of his telegram, that it understood its terms, and that it intended to make the particular sale notwithstanding it had made a general increase in the price of its lumber. Instead of acting in bad faith, it seems to us that the broker acted in

the best of faith. Aside from the fact that he had contracted the lath and certain specifications of the lumber at less than the list price, the sale did not need confirmation, and the fact that he submitted the whole of the agreement before closing it evidences a desire to inform, not to mislead.

There is no telegraph station at the respondent's place of business. Telegraph messages directed to it are taken at a nearby station and relayed to it by telephone. It is claimed by the respondent that the message of the appellant, when relayed to it, was in some manner garbled and its full purport not communicated; that, because of this, it was misled into the belief that the sale was made under the advanced price list, and confirmed it under that mistaken belief. But manifestly this was not the fault of the appellant. It was a way the respondent had provided for communication with it, and the appellant had the right to employ it. Moreover, the relay was on the respondent's end of the line, and it was within its power alone, not within the power of the appellant, to avoid the possibility of a mistake.

Our conclusion is that the appellant was justified in entering into the contract. Since it was made with a concededly responsible concern, he is entitled to his commission, and is not liable for any obligation the respondent may have incurred by a breach of the contract.

The judgment is reversed, and the cause remanded with instructions to enter judgment for the appellant, plaintiff below, for the amount of the commission demanded in the complaint.

MAIN, C. J., MITCHELL, PARKER, and TOLMAN, JJ., concur.

[No. 14675. Department Two. September 25, 1918.]

CALIFORNIA BUILDING COMPANY, *Respondent*, v. CHARLES DRURY, *Appellant*.[1]

LANDLORD AND TENANT—ACTION FOR RENT—DEFENSES. In an action for rent, it is no defense that the lessee had incorporated his business and made the lease for the benefit of the corporation, and claimed offsets for damages to the goods of the corporation by rats and vermin in the building; as the corporation was not a party to the lease, which required written consent to change of possession, and any oral understanding would vary the terms of the lease.

SAME. In an action for rent of premises abandoned by the lessee, it is no defense that the landlord could have rented the premises to another tenant; since it had a choice of remedies and could either enter, or hold the lessee for the term; and for the same reason the lessee could not claim a credit on account of probable saving on heat and water bills for the premises to the expiration of the lease.

SAME—ACTION FOR RENT—DEFENSES—EVICTION—EVIDENCE—SUFFICIENCY. In an action for rent, no eviction is shown on account of rats and vermin, where no complaint was made and no opportunity offered to remedy the matter until after the tenant had abandoned the premises.

SAME. In an action for rent, no eviction is shown by reason of failure of the heating system, where no complaint was made in that regard subsequent to early in January, the rent was regularly paid for five and one-half months, and there was no evidence of failure to properly heat the building at that time, when the premises were abandoned without complaint as to the heating.

SAME—ACTION FOR RENT—ATTORNEY'S FEES—EVIDENCE. In an action for rent, under a lease providing for attorney's fees in such an action in "the amount to be determined by the court," the court may fix the attorney's fees without taking evidence, even though the trial was to a jury.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered September 12, 1917, in favor of the plaintiff, upon withdrawing the case from the jury, in an action for rent. Affirmed.

[1]Reported in 175 Pac. 302.

A. R. Titlow and *Leon M. Bailey,* for appellant.

Fogg & Fogg and *Bates & Peterson,* for respondent.

MACKINTOSH, J.—Respondent brought this action to recover rent under a lease for the months subsequent to May, 1916, the appellant having left the premises in that month and refusing to pay rent for the balance of the term provided for in the lease. The appellant, answering the complaint, admitted that he had paid no rent from June 1, 1916, and alleged that the respondent had not properly heated the premises, and that, on account thereof, he had abandoned the same and rescinded the lease; and as an affirmative defense and counterclaim, he alleged that he had incorporated his business under the name of Drury the Tailor, and that the corporation had been carrying on the tailoring business in the premises, and that appellant had made the lease for the benefit of this corporation with the knowledge of respondent; that the corporation had carried a stock of goods in the premises; that, upon the respondent's failure to properly heat the premises, the appellant had notified it that he and the corporation would terminate the lease and move if the heat was not properly supplied, and that he did finally move on account of the lack of heat, in May, 1916. The answer also alleged that other portions of the same building in which were situated the leased premises were occupied by other tenants of the respondent, and that rats and vermin from these other premises had entered the premises occupied by the appellant and spoiled the goods of Drury the Tailor, and that he had notified the respondent that he would move if it did not remedy the situation. The answer further alleged that the goods of the defendant and Drury the Tailor were damaged by rats to the amount of $500, and that, by reason of the failure to properly heat the premises,

the appellant was obliged to move his business, at a further damage of $500. It is also alleged that, after the appellant had moved, the respondent had an opportunity to lease the premises to other parties, but failed to do so. A further allegation was that, by reason of the fact that appellant had moved out in May, the respondent had saved expenses on water and heat amounting to $480 to the expiration of the lease. The prayer was for judgment against the respondent in the sum of $1,000, and a reduction of $480 from the amount due on the rent.

The court struck from the answer the allegations regarding damages suffered by the corporation from the alleged lack of heat and for damages to its goods by rats and vermin, and the allegations that respondent could have rented the premises to other parties, and also the claim for the reduction of $480.

The case went to trial before a jury, and at the conclusion of the testimony, a motion therefor having been made, the court took the case from the jury and rendered judgment against the appellant for the full amount claimed, together with an attorney's fee of $100.

Reversal is sought upon the ground of several errors, the first being that the court should not have stricken those portions of the answer which set up the defenses as to the damage done by rats and vermin. We cannot agree with the appellant, for the reason that the damages claimed were alleged in the appellant's answer as damages sustained by a corporation which was not a party to the lease, the lease providing that no person other than the lessee should occupy the premises or any part thereof without the written consent of the lessor. The appellant could not be allowed to introduce evidence of any oral understanding that he was taking the lease for a corporation, as this

would vary the terms of a written instrument. *Hockersmith v. Ferguson,* 63 Wash. 581, 116 Pac. 11.

The second assignment of error is that the court improperly struck that portion of the answer which alleged that the respondent could have saved itself from loss by accepting another tenant after the appellant had vacated the premises. This defense was not available for the reason that, upon the appellant's removal, the respondent had the right to consider the lease as still in existence and to begin an action for the installments of rent due thereon. The respondent could have, had it so chosen, treated the vacation of the premises as a termination of the lease and reentered the premises and sued for a breach, but having the election of remedies, it chose to consider the lease as still continuing in force, and was under no obligation to accept any other tenant during the term provided for in the appellant's lease. *Brown v. Hayes,* 92 Wash. 300, 159 Pac. 89.

This same rule disposes of the third assignment of error, which was based upon the court's striking the allegation that the appellant was entitled to a credit of $480, being the amount it would probably have cost respondent to furnish heat and water to the premises from the time of appellant's vacation to the expiration of the lease. Respondent chose to consider the lease as still continuing in force, and the water and heat were available to the appellant throughout the balance of the term.

The fourth assignment of error presents the most important question of the case, which is, that the court improperly took the case from the jury and rendered judgment. The record discloses that, early in January, 1916, the appellant complained to respondent that the premises were being insufficiently heated, and appellant testified that that condition continued, but also

testified that he made no further complaint after January 2, 1916, but continued to occupy the premises, paying his rent regularly without protest up until the 18th day of May, 1916, at which time he vacated the premises and removed to a building of his own just then completed, the construction of which he had begun in January, 1916. There is no proof in the record that the premises were being insufficiently heated at the time of the appellant's vacation, or that the respondent, subsequent to the complaint in January, had, by promises of remedying the situation, lulled the appellant into thinking that the heating appliances were to be altered. When the bill for the rent for the month of June was presented to the appellant, he wrote the respondent as follows:

"I notified you the first part of last January that the store formerly occupied by us was untenantable on account of the rats destroying our goods, and unless something was done to remedy it we should move. We had appealed to you many times before that but you failed to have the matter attended to. Consequently we were obliged to move, and on May the 18th we abandoned the store and turned the key over to you. Our damages from the nuisance above referred to has been very material, and in due time shall present claim for it in view of these facts. We feel that there is no further obligation on our part and refuse to pay any more rent."

The record does not disclose that, in January, any complaint had been made in regard to the rats, and the first time the respondent's attention was called to the presence of rats as being a reason for the cancellation of the lease was in this letter, and that being after the vacation of the premises, no opportunity was given to the respondent to rectify the situation.

This being the evidence in the case, the court was right in withdrawing from the jury the question of whether there had been an eviction by the respondent which would defeat its right to recover the rent sued for. There certainly had been no eviction by reason of the annoyance from rats, for, as we have seen, there had been no eviction claimed on that ground until after the vacation of the premises, and the respondent was entitled to an opportunity to remove the nuisance before the appellant would be entitled to vacate.

There was no eviction by reason of the failure of the heating system, for the reason that no complaint was made in regard to that condition subsequent to early in January; the tenant remained in possession five and one-half months thereafter without complaint, paying his rent regularly, and when he did finally vacate, he assigned an entirely different cause as his reason for vacating—to remove to his own building just then finished. Under all these facts, the court was justified in saying there was no evidence sustaining the defenses pleaded by appellant.

After having taken the case from the jury, the court, in addition to granting judgment for the amount of the rent, gave judgment for a reasonable attorney's fee in the sum of $100. This also is assigned as error, it being claimed that at least the question should have been submitted to the jury as to the reasonable value of the attorney's fees. We cannot agree with this contention, for the reason that the lease itself provides that, "if the said lessor shall institute suit to collect said rent . . . the said lessee agrees to pay to said lessor a reasonable attorney's fee, the amount thereof to be determined by the court, and agrees that the same may be taxed as a part of the costs of said action." This provision of the lease was intended to, and did, leave the question of the attorney's fees en-

tirely with the court, even though the action on the lease might be tried to a court and jury. The province of the jury was to render a verdict for the amount it found due, and thereafter it was the province of the court to fix a reasonable attorney's fee, which, under the provisions of the lease, should be taxed as costs. We have repeatedly decided that the court may determine what is a reasonable attorney's fee without the taking of evidence.

The judgment of the lower court will be affirmed.

MAIN, C. J., and MOUNT, J., concur.

[No. 14834. Department Two. September 25, 1918.]

JAMES SUTHERLAND, *Appellant*, v. FIDELITY & CASUALTY COMPANY OF NEW YORK, *Respondent*.[1]

INSURANCE—INDEMNITY INSURANCE—POLICY — LIABILITY — LOSSES COVERED. An indemnity policy insuring a physician "against loss from liability imposed by law" on account of bodily injuries suffered in consequence of "malpractice, error or mistake," in the practice of his profession, covers a judgment recovered against the insured for damages for failing to remove gallstones from a patient operated upon under a contract to remove all gallstones in the body of the patient; since the judgment was a "liability imposed by law" for an error or mistake in the practice of his profession.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered February 2, 1918, upon findings in favor of the defendant, in an action on an indemnity insurance policy, tried to the court. Reversed.

McCarthy & Edge and *George D. Lantz*, for appellant.

Davis & Heil, for respondent.

[1]Reported in 175 Pac. 187.

MOUNT, J.—This action was brought to recover upon a liability insurance policy. The defendant denied liability upon the policy. The case was tried to the court without a jury. The trial court concluded that there was no liability upon the policy, and entered a judgment dismissing the action. Plaintiff has appealed.

The facts are not in dispute. It appears that, in 1911, the respondent issued its policy agreeing to indemnify the appellant, who is a physician and surgeon, "—against loss from the liability imposed by law upon the assured, for damages on account of bodily injuries or death, suffered by any person or persons in consequence of any malpractice, error or mistake—(a) of the assured in the practice of his profession during the term of this policy; . . ."

Thereafter, while the policy was in force, on December 4, 1912, the appellant performed an operation upon one Michael Schuster, who thereafter brought an action against the appellant, claiming that the latter failed to remove a gallstone which should have been removed in the course of the operation performed. In that action, Schuster recovered a judgment against the appellant in the sum of $2,466.15 and costs. The case was appealed to this court and the judgment affirmed. See *Schuster v. Sutherland,* 92 Wash. 135, 158 Pac. 730. The appellant, at the same time, carried insurance in other companies, which paid their proportionate share of the judgment. This action was brought to recover the remainder against the respondent. It appears from the record in *Schuster v. Sutherland* that the appellant entered into an agreement with Mr. Schuster to remove all gallstones then in the body of Mr. Schuster, and all cause of disease possible to be removed by a surgical operation; that appellant violated that agreement because he failed in said operation to remove a gallstone then in the body of Mr.

Schuster; that, by reason of said breach, Schuster and wife were damaged in the sum of $2,466.15. The trial court was evidently of the opinion that, because there was a special agreement to remove gallstones and to cure Mr. Schuster of the disease from which he was then suffering, this was not a liability insured against by the policy.

Respondent argues, in substance, that there can be no recovery upon the policy because the liability adjudicated in the *Schuster* case is not covered by the terms of the policy. We think the trial court was in error in holding that the liability adjudicated in the *Schuster* case was not covered by the policy of indemnity. The policy agrees to indemnify the appellant against loss from liability for damages suffered by any person in consequence of malpractice, error or mistake of the assured in the practice of his profession. It is plain from the record in the *Schuster* case that Mr. Schuster was injured by the doctor in the practice of his profession. If the damage was not caused by malpractice, it was clearly caused by error or mistake in not removing the gallstone from the person of Mr. Schuster, and for that reason, as shown by the opinion, the damage was assessed against the appellant. This was a loss clearly imposed by law upon the appellant. He was required to pay, and did pay, that amount for the error or mistake which he made in not removing the gallstone while in the practice of his profession. It is argued by the appellant that "the liability imposed by law," contained in the policy of indemnity, refers to common law liability only, and it is argued that a surgeon, under the law, is not required to enter into a contract, but is liable only for failure to exercise diligence, care and skill such as is ordinarily possessed by the members of his profession in good standing, and that, when he made a contract to

do more than that, he took upon himself a liability not imposed by law.

This reasoning would no doubt be sound in case of malpractice on the part of the physician, but clearly the physician had a right to enter into a contract to remove all gallstones from the body of his patient and to effect a cure. He clearly had a right to do this in the practice of his profession, and if he made an error or mistake, or was guilty of malpractice, and damages resulted thereby to his patient, a recovery might be had. The words *malpractice, error* and *mistake,* as used in this indemnity policy, do not mean necessarily the same thing. If they were so intended, it was an idle thing to insert more than the word *malpractice.* A physician may err or make a mistake without being guilty of malpractice. This policy covers malpractice. It covers error, and it covers mistake in the practice of appellant's profession; and if liability flows from either, and he is required to pay damages on that account, we think it is plain that the policy here undertook to insure against such mistake or such error, as well as against malpractice. The words "liability imposed by law" clearly refer to a judgment recovered on account of malpractice, error or mistake, and do not limit the policy to cases where there was simply malpractice, where the physician is required to use care, diligence and such skill as is ordinarily possessed by the average members of the profession in good standing. The judgment in the *Schuster* case was a liability fixed by law. This liability resulted from an error or mistake of the appellant in his treatment of Mr. Schuster. The mere fact that appellant had a special contract to remove all of the gallstones from Mr. Schuster did not affect the insurance policy, because it was a contract made in the practice of appellant's profession and one which he clearly had a right to make. The re-

sult was that he failed to remove the gallstones, and, therefore, failed to cure the patient as he had agreed to do, and damages resulted which he was required to pay. We are of the opinion, therefore, that the policy covered the liability, and that the appellant is entitled to recover the balance which he was required to pay under the judgment, which, according to the evidence, was $1,603.33.

The judgment of the trial court is therefore reversed, and the cause is remanded with instructions to enter a judgment against the respondent, in favor of the appellant, for $1,603.33.

MAIN, C. J., HOLCOMB, PARKER, and MACKINTOSH, JJ., concur.

[No. 14840. Department Two. September 25, 1918.]

SPOKANE VALLEY GROWERS' UNION, *Respondent*, v. SPOKANE & INLAND EMPIRE RAILROAD COMPANY, *Appellant*.[1]

CARRIERS—OF GOODS—REFUSAL TO ACCEPT GOODS—LIABILITY. It was the duty of a carrier to accept the shipment and it is liable for refusal to do so, where, after a car of apples had been loaded, the carrier refused to accept the shipment pursuant to its tariff regulations, option No. 2, giving heater service and requiring the carrier to assume all liability for loss due to frost or heating, because a dispute arose as to whether the apples had been frost-bitten before loading, and the shipper then offered to indemnify the company against any claim for damages on that account, as it would in no event be liable therefor.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered January 9, 1918, upon findings in favor of the plaintiff, in an action for damages, tried to the court upon an agreed statement of facts. Affirmed.

[1]Reported in 175 Pac. 184.

Graves, Kizer & Graves, for appellant.

Tustin & Chandler, for respondent.

MOUNT, J.—This action was brought to recover damages for an alleged wrongful refusal to receive for carriage a carload of apples tendered by the plaintiff. The facts were stipulated. Judgment was rendered in favor of the plaintiff. The defendant has appealed.

The facts are as follows: The appellant is a common carrier of freight, as designated in the tariffs filed with the interstate commerce commission. The appellant maintained a rate jointly with the Great Northern Railway Company for carrying boxed apples in carload lots over its own line and that of its connecting carrier, the Great Northern Railway Company. Tariff 25C and supplement No. 7 provided as follows:

"In order that shipments of perishable freight may be protected from loss on account of frost, freezing or overheating during the period October 15th to the following April 15th, inclusive, the shipper shall either assume responsibility for such protection or request the carrier to do so.

"The shipper must specify on orders for empty cars, or in such manner as is provided by carrier prior to the loading, whether he desires to ship under Ventilation or Shippers' Protective Service (see Option No. 1, page 24 of tariff, and as supplemented), or under Carrier's Protective Service (see Option No. 2, page 25 of tariff, and as supplemented), and no change from one service to different service will be permitted after shipper has commenced loading of car.

"When the shipper neglects or refuses to specify as above provided, whether he desires the freight to be transported under Option No. 1, page 24 of tariff (and as supplemented) or under Option No. 2, page 25 of tariff (and as supplemented), the shipments will be transported subject to all the terms of Option No. 2, page 25 of tariff (and as supplemented), in which event the agent at the point of origin shall enter on

bill of lading and waybill the following endorsement: 'Protective service under terms of Option No. 2 assumed by carrier.'

"Shipper must make one of the following endorsements on bill of lading: 'Responsibility for damage from frost, freezing, overheating or protection against heat, assumed by shipper' or 'Liability for damage from frost, freezing or overheating to be assumed by carrier.' "

Under the head of option No. 1 it was provided:

"Under this option the shipper assumes all responsibility for loss due to frost, freezing or overheating not the direct result of the negligence of the carrier.

"The following notation must be shown on bill of lading: 'Responsibility for damage from frost, freezing or overheating assumed by shipper.' "

Under the head of option No. 2 appears this provision:

"Under this option, the carrier assumes all liability for loss due to frost, freezing or heating, not the direct result of the negligence of the shipper.

"The following notation must be shown on bill of lading: 'Liability for damage from frost, freezing or overheating to be assumed by carrier.' "

Sometime prior to December 19, 1916, the respondent agreed to sell to one Sawyer, at Billings, Montana, 630 boxes of apples. Respondent was to ship the apples over the lines of appellant and one of its connecting carriers, either the Great Northern Railway Company or the Northern Pacific Railway Company, to Billings, Montana. Mr. Sawyer was to have the right to inspect the apples at Billings before his acceptance of the same. The price for the apples, according to the agreement between respondent and Sawyer, was $535.95, all freight and heater service charges to be paid by the purchaser upon the arrival of the apples at Billings. Under the agreement with Sawyer, re-

spondent was to ship the apples under option No. 2 of the tariff above described, the carrier to assume all liability for loss due to frost, freezing or heating not the direct result of the negligence of the shipper. Thereafter the respondent requested the appellant to furnish a car, to be routed via either the Great Northern or Northern Pacific railway, in which to ship the apples by heater service to Billings, Montana. Thereupon appellant applied to the Great Northern Railway Company for a refrigerator car, and, upon receiving the same from that company, furnished such car to the respondent. The car was No. 50132 of the Great Northern Railway Company. The appellant placed the car on its loading track or spur at Opportunity, Washington, and on the evening of December 19, 1916, notified the respondent that the car was so placed and was ready to be loaded. Thereupon, on the next day, the respondent loaded 630 boxes of apples upon the car. These apples were packed in boxes of the Northwest standard size; the tops, sides and bottoms of the boxes were securely nailed on, entirely enclosing the fruit, except for three cracks, one-half inch wide, extending lengthwise on the top and bottom of the boxes. The apples were each separately wrapped in paper and packed in layers in the boxes. Prior to the loading of the apples, they had been kept and stored in a natural air storage, intended and believed to be thus protected against frost, and had not previously been stored or shipped under refrigeration. On the same day, December 20, 1916, respondent, by its president, Edward Pierce, requested from the appellant, through its agent at Opportunity, a bill of lading for said apples, which bill of lading was then and there made out in triplicate and tendered by the respondent to the appellant, a copy of which is attached to the statement of facts; and at

that time wrote a letter to the agent as follows, omitting the date and address:

"Dear Sir: You are hereby advised that GN car 50132 furnished by you on our recent order for an NP or GN car in which to ship box apples heater service, to Billings, Montana, is now loaded and ready to move at your station.

"We desire this car shipped to our order, notify J. M. Sawyer, Billings, Montana; the shipment to be subject to inspection and diversion with 'liability for damage from frost, freezing or overheating to be assumed by carrier.'

"We have prepared and herewith tender and leave in your possession standard bill of lading filled out as above which we request that you forthwith sign and return the original and one duplicate to us.

"We would further advise you that the said car of fruit, now loaded and on your switch at Opportunity is hereby delivered into you possession for transportation in accordance with said billing, and we request that you immediately move and transport said car of apples to its destination in accordance with said billing.

"The weather indications are now such that the said fruit may, and likely will be endangered if the said car is not supplied with proper protection.

"Please take notice of all the above matters and take such immediate action in the premises as may be necessary to perform your full duty with reference to said shipment. Spokane Valley Growers' Union."

Thereafter, on December 22, 1916, the appellant addressed a letter to Mr. Pierce as follows:

"My Dear Sir: This formal notice is to confirm the oral notices heretofore given to you that the apples which you have loaded in Great Northern Car No. 50132 on the tracks of the Spokane & Inland Empire Railroad Company at Opportunity cannot be accepted for shipment under Option No. 2 bill-of-lading which provides for carrier's responsibility, for the reason that an inspection of said apples made when said car was being loaded, disclosed to us that certain apples

loaded therein have been frost-bitten. You have at all times been offered and are now offered the privilege of shipping these apples under bill-of-lading Option No. 1 which provides for shipper's responsibility.

"In view of your repeated refusals to do anything with reference to these apples, you are hereby notified that unless you remove these apples from the car in which you have loaded them, within twenty-four hours from the time when this notice is served upon you, or unless within said period of time you accept a bill-of-lading under Option No. 1 providing for shipper's responsibility or accept a bill-of-lading under Option No. 2 with the notation thereon that the apples contained in the car are frost-bitten, at the time of receipt, it will be necessary for us to store at your expense these apples in the public warehouse of .....at ....., where the apples will be held by the warehouseman at your expense and subject to your order. Yours very truly,

"Spokane & Inland Empire Railroad Co."

Thereupon the respondent, by its president, addressed a letter to the appellant as follows:

"Dear Sir: Your letter or notice of yesterday relative to GN car 50132 was handed us by Mr. Piper at nine a. m. this morning.

"We note your offer to allow this car to proceed under option one at our risk, and beg to advise that we cannot so ship. The purchaser has ordered these apples to be shipped under heater service. We ordered and you furnished the car to be shipped under option two, and we have so loaded and delivered it into your possession so manifestly we cannot now permit you to change the billing.

"We note that you state as a reason for asking this change: 'that an inspection of said apples made when said car was being loaded disclosed to us that certain apples loaded therein have been frost-bitten.' This car contains 7 different varieties of apples. While your communication does not disclose what varieties are supposed to have been frost-bitten, we are verbally advised by your agents that only the Stayman Wine-

sap and Spitzenberg are involved. For your information would state that the car contains but 95 boxes of Stayman Winesaps, 70 being of the extra fancy and 25 of the fancy grade, and 49 Spitzenberg all of the "C" grade.

"We would further advise you that since the car was first visited by your inspector we also have had said fruit examined and inspected by four or five reputable and experienced fruit men, who have severally reported to us that the varieties objected to by your inspector have not been frozen or frost-bitten. This is in accordance with our own views, and it must be manifest to anyone that we cannot permit you to make any notation on the bill of lading that would conflict with what we conceive to be the truth, that these apples have not been frozen or frost-bitten.

"We will very much regret, if the stand you are taking in this matter should lead to legal controversy, and in order to obviate that result, but without in any way admitting or conceding that any of the fruit contained in said car has been frozen or frost-bitten prior to loading, we would, and hereby do, undertake to indemnify you and your connecting carrier against any claim that may be set up or asserted against either of you by reason of any alleged frost damage prior to the loading of said fruit.

"While it has not been your practice to require any guarantee of freight on shipments heretofore carried for us, we would be and are perfectly willing to guarantee the payment of the freight on this shipment in order to insure the prompt movement of same in accordance with the billing we have tendered you.

"Trusting this may remove any doubt you may entertain as to the condition of said fruit and induce you to go ahead and perform your full duty with respect to the transportation of said fruit and the issuance of a proper bill of lading therefor, we remain,

"Spokane Valley Growers' Union."

The freight was not moved thereafter, and the apples were thereupon stored in a warehouse in Spokane and subsequently sold for the sum of $286.10, which

amount was deposited with the clerk of the court to be held by him until the determination of this action.

On these facts the trial court concluded that the respondent was entitled to recover for the failure of the appellant to carry the apples, and gave judgment accordingly. It is apparent from this statement of the facts that, after the apples were loaded on the car, which was furnished by the appellant to the respondent under option No. 2, a dispute arose between the shipper and the agent of the carrier as to whether or not the apples had been frost-bitten. The carrier contended that the apples had been frost-bitten, and the shipper contended that they had not been frost-bitten. The carrier thereupon refused to carry the apples under option No. 2, by which it assumed all liability for loss due to frost, freezing or heating not the direct result of the negligence of the shipper. The shipper thereupon offered to indemnify the appellant and its connecting carrier against any claim that might be set up against either by reason of any frost damage prior to the loading of the fruit. This offer was declined and the fruit was not shipped.

The appellant argues that it had a right to make reasonable rules and regulations with reference to the carriage of fruit; that, when its inspectors found that part of the fruit had been frost-bitten, it had a right to have this notation made upon the bill of lading. If we may assume that, appellant could refuse to ship the fruit without a statement of its true condition. The claim that a part of the fruit was frost-bitten was disputed by the shipper, which offered to indemnify the carrier against any claim for damage on that account. Under these circumstances, we think it was the duty of the carrier to accept the fruit and to carry it as requested by the respondent. The appellant is a common carrier of freight. It was bound to take all freight

which was offered. 4 R. C. L., § 137, page 658. It was liable only for its own negligence. 4 R. C. L., §§ 200, 201, pages 728 to 730; 10 C. J., § 148, page 121. Even under option No. 2, quoted above, it was not liable for negligence of the shipper, and if the shipper loaded apples which had been frost-bitten, and which on that account, and not on account of the negligence of the carrier, became lost, the loss would fall upon the shipper and not upon the carrier.

We are satisfied, therefore, that the trial court rightly decided the case.

The judgment is affirmed.

MAIN, C. J., HOLCOMB, MACKINTOSH, and PARKER, JJ., concur.

[No. 14507. Department One. September 27, 1918.]

WM. D. PERKINS *et al.*, *Appellants*, v. THE TOWN OF SIDNEY, *now Town of Port Orchard*, *Respondent.*[1]

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENT FUND—WRONGFUL DIVERSION—EVIDENCE—SUFFICIENCY—BURDEN OF PROOF. A town is not liable to the holder of warrants for wrongful diversion of the local improvement fund by the payment of subsequent warrants out of order, where it is not shown that the amount paid out and diverted would have been sufficient to pay all warrants prior in time and lower in number than those upon which the action is based.

TRIAL—REOPENING CASE—DISCRETION. It is not an abuse of discretion to refuse to reopen a case for further evidence where it had been pending many years and been previously once tried.

Appeal from a judgment of the superior court for Kitsap county, Mitchell, J., entered June 16, 1917, upon granting a nonsuit, dismissing an action to recover on local improvement warrants. Affirmed.

[1]Reported in 175 Pac. 301.

Carroll Hendron, for appellants.
John G. Barnes, for respondent.

MAIN, C. J.—The purpose of this action was to recover upon three local improvement warrants. The trial resulted in a judgment of dismissal at the conclusion of the plaintiffs' case, from which the appeal is prosecuted.

The facts are these: For certain street improvement work, the town of Sidney (now the town of Port Orchard) issued and delivered warrants to the contractor for the work. At the time this action was instituted, three of these warrants were held and owned by the appellants. One of the warrants was drawn on district No. 4 street improvement fund, and the other two on district No. 5. Certain warrants which were subsequent in time and higher in number than those above referred to had been paid by the city prior to the institution of this action.

The action was begun on March 22, 1905, and was tried to the court in March the year following. Before a decision was rendered, and on April 27, 1909, upon the plaintiffs' motion, a new trial was granted. The cause was again tried to the court without a jury on December 19, 1912. At the close of the plaintiffs' case, the defendant moved for a nonsuit. This motion was taken under advisement by the court, and, before a decision was announced, the plaintiffs moved the court to defer the ruling on the motion for nonsuit, to reopen the cause and permit additional testimony to be introduced. This motion was denied, and from the judgment entered, the appeal was taken.

The record contains no evidence as to the number of warrants issued against the two funds, the amount of money in the funds at any time, or the amount of money, if any, which had been paid into the funds.

The first question is whether the record presents a *prima facie* case of liability on the part of respondent town. It is the settled law of this state that, before a city or town can be charged with primary liability on account of having paid local improvement warrants subsequent in time and higher in number than those upon which the action is based, there must be a showing that there came into the fund money sufficient to pay all warrants, and the interest thereon, which were prior in time and lower in number than those upon which the action is based, and pay the warrants sued upon, had not the money been diverted to the payment of warrants which were subsequent in time and higher in number. *Quaker City Nat. Bank v. Tacoma,* 27 Wash. 259, 67 Pac. 710; *Hemen v. Ballard,* 40 Wash. 81, 82 Pac. 277.

In the case first cited it is stated:

"It is the settled doctrine of this court that misappropriation of moneys belonging to a special fund of a city by the city will render it generally liable to the holders of warrants drawn upon the special fund to the amount of the moneys so misappropriated, and that the payment of warrants drawn upon a special fund, issued subsequent in time to other warrants drawn upon the same fund, is such a misappropriation, if the effect of such payments is to exhaust the fund and leave prior warrants unpaid."

The burden is on the party asserting liability of a city to allege and prove a misappropriation of the local improvement fund, in that warrants were paid out of their order and that the party bringing the action was damaged thereby. *Northwestern Lum. Co. v. Aberdeen,* 35 Wash. 636, 77 Pac. 1063.

The evidence in this case fails to show that the amount of money paid out on the warrants subsequent in time and higher in number would have been sufficient to pay all warrants which were prior in time

and lower in number than those upon which the action is based, assuming that the warrants were paid out of the local improvement funds. It is unnecessary to review authorities cited in appellants' brief, because, as it appears to us, the decisions of this court are controlling.

Reversal is also sought because the trial court declined to permit further testimony to be taken after the cause had been tried and prior to the time a decision was announced, but there was no error in this respect. The action had been pending many years and had been previously once tried. It was not an abuse of discretion on the part of the trial court to refuse to reopen the case for further testimony.

The judgment is affirmed.

FULLERTON and PARKER, JJ., concur.

[No. 14596. Department Two. September 27, 1918.]

W. A. HOUCHEN, *Respondent*, v. OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, *Appellant*.[1]

PLEADING — DAMAGES — WAIVER OF OBJECTIONS. A complaint demanding general damages from the sinking of a pile-driver, not moved against for not being more specific, covers such damages as were the necessary and direct result of the sinking.

COLLISION — DAMAGES — MEASURE OF DAMAGES — INJURY TO PILE-DRIVER. The elements of the measure of damages for the sinking of a pile-driver that could not be procured on the market at any time, are the replacing it in condition so far as possible, coupled with depreciation in value and the loss of use, if any, which includes the cost of raising and repairing, etc., the total recovery not to exceed the value at the time and place of the accident.

COLLISION—NEGLIGENCE—RIGHT OF NAVIGATION—INSTRUCTIONS. In an action for damages from a collision when a steamboat ran into a pile-driver anchored near fish traps, an instruction that the right

[1]Reported in 175 Pac. 316.

of navigation with reasonable regard to the rights of others is paramount to any other use of navigable waters, is properly given; and it is proper to refuse a requested instruction that the right to construct fish traps is subordinate at all times to the superior right of navigation and that steamboats may operate over any water of sufficient depth provided they act without wantonness or malice.

SAME — CONTRIBUTORY NEGLIGENCE — FAILURE TO CARRY LIGHT — TRIAL—INSTRUCTIONS. Under Fed. Stat. Ann. 158, requiring vessels at anchor to carry a light, upon an issue as to whether a light was carried by defendant's pile-driver at anchor when struck by a steamboat, plaintiff is entitled to an instruction that it would be negligence *per se* not to carry a light.

SAME—NEGLIGENCE—PRESUMPTIONS — INSTRUCTIONS. In an action for damages from collision when a steamboat ran into a pile-driver at anchor, the jury should be instructed that there is a presumption of law that it was the fault of the vessel in motion unless the pile-driver was not anchored in a proper place or not showing a proper warning light.

MAIN, C. J., and CHADWICK, J., dissent.

Appeal from a judgment of the superior court for Wahkiakum county, Hewen, J., entered June 23, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

A. C. Spencer and *John F. Reilly,* for appellant.

William Stuart and *J. Bruce Polwarth,* for respondent.

HOLCOMB, J.—Respondent instituted a common law action against appellant to recover damages for $2,500 for injuries caused at 2:50 a. m., on September 1, 1916, by appellant's side-wheel steamer "T. J. Potter" in colliding with respondent's pile-driver, which was anchored in the Cathlamet channel of the Columbia river just north of Puget Island, which divides the river into two channels. Some ten days prior to the accident, the upper Burke fish-trap, consisting of a row of piling approximately 500 feet long and extending out from the river bank, had been put in under Fed-

eral permit on the island side of the channel. Later, in the afternoon of August 31, 1916, respondent towed his pile-driver on a scow and anchored it somewhere below or down-stream from this fish-trap, the exact location being in dispute. Respondent alleged that the pile-driver was lawfully anchored in the stream outside the ordinary course and channel of vessels, with a light displayed upon it; that the "Potter" negligently departed from its usual course and swung around the end of the upper Burke fish-trap and headed for shore, continuing on that course until it ran into the pile-driver, cutting the scow in two and sinking it and the pile-driver with the appliances and equipment.

Appellant, in its answer, denied that the pile-driver displayed a light and that it was lawfully anchored in a proper part of the stream and outside the channel, but alleged that the pile-driver was unlawfully anchored in a part of the river suitable for navigation and in the usual course or channel of river steamers and of the steamer Potter; that the pile-driver was within the shadow of the mountains on the south shore and not visible until immediately before the collision, when the accident was unavoidable; that, as a result of the collision, the steamer Potter was considerably damaged and that appellant was compelled to expend $399 for repairs, which is claimed as damages and as a counterclaim. Respondent's evidence of the location of the pile-driver varied from 150 to 500 feet below the outer end of the upper Burke trap and from 150 to 300 feet inside the outer end of it, according to the estimates of different witnesses. Respondent offered evidence as to the usual course taken by the Potter after the upper fish-trap was constructed. One of respondent's witnesses testified that, before the upper fish-trap was put in, the Potter usually ran pretty close to the shore and ran about in

line where the pile-driver was located. Respondent offered evidence of a light burning on the pile-driver. The last time any witness claimed to have seen a light was at 2 a. m., fifty minutes before the accident, at which time he claims he saw some unknown person go aboard the pile-driver from a boat. No one was aboard the pile-driver at the time of the collision. The pilot and lookout of the Potter testified that there was no light on the pile-driver.

At the trial before a jury, the court, over appellant's objection, allowed evidence of the cost of raising the pile-driver, the cost of repairing it, and of profits which respondent claimed to have lost through the sinking of the pile-driver, and instructed the jury that it might allow damages for all of such items. At the close of the testimony, appellant made a motion as follows:

"The defendant now moves the court for a judgment in favor of the defendant and against the plaintiff, and that the jury be instructed to return their verdict in favor of the defendant on the issue of damages claimed by plaintiff, and that this cause be submitted to the jury upon the issue only of defendant's counterclaim against plaintiff for damages to its steamer Potter. This motion is based upon the following grounds: (1) The evidence offered in this cause does not make out a sufficient case to entitle the plaintiff to have the same submitted to the jury on the issue of plaintiff's claim for damages against the defendant. (2) There is no evidence of any negligence on the part of defendant. (3) The evidence affirmatively shows that the plaintiff was guilty of negligence which contributed to the accident. (4) The evidence affirmatively shows that the accident happened in the navigable channel of the Columbia river and that plaintiff's pile-driver was unlawfully anchored in said channel and constituted an obstruction forbidden by the law of the United States. (5) That there has been no justification shown by plaintiff for the presence of the pile-driver in the navigable channel of the Columbia river."

The appellant duly excepted to the overruling of this motion. The jury returned a verdict of $2,000 in favor of respondent.

Appellant assigns that the court erred, (1) in permitting plaintiff to testify, over defendant's objection, as to cost of raising the pile-driver and scow; (2) as to cost of repairs to the pile-driver and scow; (3) as to profits which he alleged he lost by reason of the sinking of his pile-driver; (4) in permitting plaintiff's witness Fred Houchen to testify, over defendant's objection, as to the value of the use of a pile-driver; (5) in giving instructions Nos. 9 and 11 to the jury; (6) in instructing the jury that, if they found for plaintiff, he would be entitled to the reasonable cost and expense of raising and repairing the pile-driver, engine, tools and appliances, and (7) that he would be entitled to recover the reasonable value of the services of the pile-driver and equipment during the time it was necessarily disabled, if he had opportunity to profitably employ same during said time; (8) in instructing the jury that, if they found for the plaintiff, he would be entitled to recover damages for items mentioned in (5), (6) and (7), together with the depreciation, if any, in the market value of the pile-driver and equipment from what it was prior to the collision; (9-16) in refusing defendant's requested instructions Nos. 4, 5, 7, 9, 10, 11, 12, and 13; (17) in instructing the jury that the right of navigation is paramount to other uses of navigable waters only so far as is necessary to navigate; (18) in refusing to instruct the jury that the operatives of steamboats have the right to operate them over any part of the Columbia river where the water is of sufficient depth to carry them, provided they act without wantonness and without malice and do not wilfully injure or destroy property anchored in the stream, after they discover its presence in the stream; (19) in

refusing defendant's requested instruction No. 8, which was to the effect that, if there were no lights upon the pile-driver, plaintiff was guilty of negligence; (20) in giving to the jury instruction No. 13, and particularly that part thereof to the effect that there is a presumption of law against a moving vessel; (21) in refusing defendant's motion for a directed verdict in its favor on the issue of plaintiff's claim for damages against defendant.

A vessel injured and sunk in a collision and which can be raised and repaired cannot be abandoned by the owner and treated as a complete loss. He must minimize the damages as far as possible. Respondent did not treat the pile-driver as a total loss, but demanded general damages. The complaint describes the property injured, its uses and purposes at the time of the injury. The complaint might have been more specific in alleging the different elements of damages, but it not having been moved against because of such generality, the damages must be considered such as were the necessary and direct result of the sinking of the pile-driver. The pile-driver was something that could not be procured in the market at any time; hence replacing it in condition as far as possible to do so, coupled with the depreciation in value and the loss of its use, if any, are the elements by which damage can be measured. Respondent, if not at fault, is entitled to be put in the same condition as he was before the injury, or compensated where that cannot be done. This would include the cost of raising and repairing the pile-driver, replacement of its equipment, its depreciation in value, and recovery for loss of its use; the total recovery under the pleadings not to exceed the value of the pile-driver and its appliances at the time and place of the injury. *West v. Martin,* 51 Wash. 85, 97 Pac. 1102, 21 L. R. A. (N. S.) 324.

Instruction No. 9 given by the court is as follows:

"You are instructed that the right of a vessel to navigate the waters of the Columbia river, so far as is reasonably necessary to navigate the same, is paramount to any other use of the navigable waters of said river, with this condition and limitation, however, that such navigation shall not be carried on wantonly or negligently, and shall be carried on with reasonable regard to the rights of others to use the waters of said river;"

while defendant's requested instruction No. 4 is as follows:

"In arriving at the question as to whether the defendant was negligent in the manner alleged in the complaint, I instruct you that the right to construct fish-traps in the waters of the Columbia river is at all times subordinate to the superior right of steamboats to navigate the same, and that the operatives of such steamboats have the right to operate said boats over any part of said stream where the water is of sufficient depth to carry the same. Provided they act without wantonness and without malice and do not wilfully injure or destroy property anchored in the stream, after they discover its presence in the stream."

Instruction No. 9 was proper, while requested instruction No. 4 was properly refused.

The question at issue is not the restricted use of the river; but the negligent exercise of the right to use the river. The defendant cannot escape liability by claiming an exclusive right to navigate anywhere, at all times, and under all circumstances, but must regard the rights of others when using the river in lawful navigation or anchorage. The effect of defendant's contention would be the exclusion of others from using the river, regardless of either the necessity of the circumstances or the requirements of careful navigation, and would be a claim for immunity from carelessness or negligence on account of a superior right.

The vital question remaining is whether the pile-driver maintained a proper light at the time of the collision. The court refused to give defendant's requested instruction No. 8, or to instruct the jury that failure to have a light on the pile-driver would be negligence. The statutes of the United States require an anchored vessel to carry a light. Act of August 19, 1890, art. 11, § 1; 2 Fed. Stat. Ann. 158; 26 Stat. L. 324:

"A vessel under one hundred and fifty feet in length, when at anchor shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of (at) least one mile."

Facts as to which reasonable minds might differ are questions for the jury under proper instructions. The respondent contends that this matter was fully covered by the court's instructions Nos. 4, 5, 6 and 12. The instructions do not directly cover the point, except instruction No. 5, where the court recites the defendant's affirmative answer, but does not state any rule of duty respecting same. If the court had used the following, or words of similar import: "If you find from the evidence that plaintiff failed to maintain a proper warning light at the time of the collision, plaintiff would be guilty of contributory negligence and cannot recover," in place of the last sentence of instruction No. 5 which reads as follows: "This is known as the defense of contributory negligence;" or had given a separate instruction to the same effect and import, it would have been clear to the jury. If respondent's pile-driver had no proper light upon it at the time of the collision, it would be negligence *per se*. The requested instruction No. 8, or one of similar import, should have been given by the court.

Appellant contends that that part of instruction No. 13 which covers the presumption of law against a moving vessel is erroneous. The instruction is:

"You are further instructed, as a matter of law, that if a ship or steamer in motion or under way comes into collision with an anchored vessel, there is a presumption of law that it was the fault of the vessel in motion, unless as a matter of fact the anchored vessel was where she should not have been anchored; but whether she is in an improper place and whether properly or improperly anchored, the vessel in motion or under way must avoid her if it is reasonably practicable and consistent with her own safety and the vessel has an opportunity to do so. In the present case, if you find from the evidence that the pile-driver was properly anchored and in a proper place, then the burden is upon the defendant to show by a preponderance of the evidence that the collision occurred without fault on its part or through some fault of the plaintiff. The court instructs you that the question as to whether the said pile-driver of plaintiff was anchored in a proper place is a question of fact to be determined by you from the evidence, and all the attendant circumstances connected with the use for the purposes of commerce and navigation of the particular portion of the river where the evidence discloses she was anchored."

In the case at bar, the instrumentality which produced the injury was under the management of the defendant. An accident happened which in the ordinary course does not happen if those managing the instrumentality exercise proper care, and the presumption of negligence attaches; but this presumption may be rebutted by evidence that the anchored pile-driver was not in a proper place and was not maintaining a proper warning light. Therefore, the instruction is correct, with the exception that the court failed to instruct in regard to the maintenance of the warning light. Thus, if the second sentence of instruction No. 13 be amended to read as follows: "In the present case, if you find

from the evidence that the pile-driver was properly anchored in a proper place with a proper warning light maintained, then the burden is upon the defendant to show by a preponderance of the evidence that the collision occurred without fault on its part or through some fault of the plaintiff," or of similar import, it will be proper.

Most of the errors claimed are upon questions of fact for the jury, properly submitted, and need not be discussed.

Upon the ground of the foregoing errors indicated, the judgment will be reversed and the cause remanded for new trial.

MOUNT and MACKINTOSH, JJ., concur.

CHADWICK, J. (dissenting)—Aside from the question of law discussed in the opinion of the court, the motion for nonsuit should have been sustained. Furthermore, it is held that negligence is never presumed, and a reading of the record in the light of all of the concomitant facts and circumstances convinces me that the defendant was not negligent and that the plaintiff was guilty of contributory negligence. He negligently anchored his pile-driver in a place where the waters were navigable, and was in or very near the course of passing vessels. The Potter was maintaining its course from the Burke fish-trap to its beacon on the north shore of the stream. If the pile-driver had been anchored under the lee of the Burke fish-trap, as plaintiff contends it was, it would have been impossible for the Potter to have collided with it without lessening its speed and steering to the south; in other words, to have described a circle from the Burke fish-trap to the south instead of pursuing its direct course, as all of the testimony shows that it did. All of the physical facts—the very fact that there was an accident at the place it occurred

—shows beyond the power of plaintiff to dispute that he is mistaken when he says that he anchored his pile-driver below the Burke fish-trap and out of the channel. He anchored in a place where thirty-three feet is extreme low water, and if negligence is not to be presumed, if we are not to impute a willful design to defendant to run his pile-driver down and sink it, it seems impossible for the minds of reasonable men to hold the defendant to the entire blame for the collision.

If the ruling of the court upon the motion for a nonsuit is to be sustained, the case should be reversed upon still other grounds. The law is that the right of navigation is paramount. The corollary of this is that one who obstructs a navigable stream by anchoring a vessel in or near the course of passing vessels takes upon himself a burden of extraordinary care, and while, under some circumstances, it would be proper for a court to lay down the abstract proposition that, when a collision with an anchored vessel occurs, there is a presumption of law that it is the fault of the vessel in motion, it was error to so instruct in this case.

Instruction No. 13 is not fortified by counsel for respondent by the citation of any text or authority. He contents himself by saying, "This instruction is simply a declaration of the doctrine *res ipsa loquitur*," and that a presumption exists in favor of a moored as against a moving vessel. We may well imagine a case where a court would put the burden upon a moving vessel as against one anchored in the daytime even in midstream or the fairway of a harbor. For, if it be there, the pilot of the moving vessel seeing and knowing, or having opportunity to see and know its presence, the court might properly instruct that a presumption of negligence arises against, or, more properly speaking, the burden of proof is upon, the moving

vessel. But this case affords a striking illustration of the fault of seizing upon some abstract proposition gathered from the whole body of the law and rehearsing it to a jury simply because there has been a collision between a moving and an anchored vessel.

The true rule is noticed in the majority opinion, but it is nullified by the approval of instruction No. 13. The rule governing this case is simple. Defendant had a right to navigate and its right was paramount to the right of others to use the stream for anchorage, with the limitation, however, that its right of navigation must not be so exercised as to wantonly or willfully injure other rights. That the pile-driver was anchored in navigable water is not disputed, and whatever the course of the Potter may have been, so long as it was in navigable waters its right was paramount. *People v. St. Louis,* 5 Gilman 351, 48 Am. Dec. 339; *Warner v. Ford Lum. & Mfg. Co.,* 123 Ky. 103, 93 S. W. 650, 12 L. R. A. (N. S.) 667; *Porter v. Allen,* 8 Ind. 1, 65 Am. Dec. 750; *Lewis v. Keeling,* 46 N. C. 299, 62 Am. Dec. 168; *Post v. Munn,* 4 N. J. L. 67; *Horn v. People,* 26 Mich. 221; *The John H. Starin,* 122 Fed. 236.

If this action had been brought under the maritime law upon a finding that the defendant was negligent, the damages would have been divided between the two vessels. *The Hilton,* 213 Fed. 997; *The Passaic,* 76 Fed. 460; *The Itasca,* 117 Fed. 885.

This being so, and there being no evidence, other than the happening of the accident, of a wanton or willful disposition—design, as some of the books put it—to destroy the property of plaintiff, it follows that instruction No. 13, which put a presumption of fact upon defendant that the collision occurred through the fault of the moving vessel, was error.

The opinion of the court is faulty for another reason.

It is said: "An accident happened which in the ordinary course does not happen if those managing the instrumentality exercise proper care, and the presumption of negligence attaches." We have held so many times that no presumption of negligence arises from the mere happening of an accident that it would be idle to assemble our cases, and to now say that an accident happened which in the ordinary course does not happen if those handling the instrumentality exercise proper care, is to absolutely destroy the defense of contributory negligence. For accidents do happen when those managing the more forceful instrumentality are in the exercise of reasonable care.

Furthermore, I protest against the holding that "the effect of defendant's contention would be to exclude others from using the river, regardless of either the necessity or the circumstances or the requirements of careful navigation, and would be a claim of immunity from carelessness or negligence on account of a superior right." Defendant has not contended that it had an exclusive right to navigate the stream, nor is there any testimony to show that the Potter was not carefully navigated. The contention of the defendant is that it has a paramount right to move its vessel in navigable waters, and that it cannot be charged with negligence unless the testimony shows conclusively, or by preponderating inferences, that it wantonly or wilfully wrecked the plaintiff's pile-driver.

The complaint was drawn on the theory that the pile-driver was totally destroyed, and general damages of $2,500 was asked. The court admitted evidence of the original cost of the pile-driver, which was about $6,000, and, over defendant's objection, admitted testimony to show the amount expended in raising and repairing the hull and the replacement of the machinery and tools that were lost beyond recovery. The testi-

mony should not have been received unless the complaint were amended and an opportunity given to plead to the issue tendered at the time. Upon new trial the complaint should be amended with leave to answer.

I think, too, that the opinion places a wrong construction upon the case of *West v. Martin,* 51 Wash. 85, 97 Pac. 1102, 21 L. R. A. (N. S.) 324. The rule there laid down is that the measure of damage in a case like this is the cost of repairing. Recovery is not to be limited by a sum "not exceeding the value of the pile-driver at the time and place of the injury," but by the cost of repairing, not exceeding the amount demanded in plaintiff's complaint. In this the trial court also erred, for the jury was instructed that the plaintiff might recover the cost of raising and repairing, not to "exceed the sum of $2,500 asked in the complaint, and provided the cost of repairing did not exceed the value of the pile-driver and equipment before the collision."

After plaintiff had outlined his case as contrary in fact and in law to the case made in the pleadings, the court should have excluded or stricken all testimony going to the value or first cost of the pile-driver. It was prejudicial and misleading, and, when considered in the light of the instruction, was an invitation to the jury to consider the first cost as a factor in the equation of damages. Its tendency must have been to enhance the damages over a normal or just recovery.

MAIN, C. J., concurs with CHADWICK, J.

[No. 14674. Department One. September 27, 1918.]

BUSH & LANE PIANO COMPANY, *Appellant*, v. MRS. M. V. WOODARD *et al.*, *Respondents*.[1]

HUSBAND AND WIFE — SEPARATE PROPERTY — WIFE'S CONTRACTS — FAMILY EXPENSES — STATUTES. Where a wife purchased a piano on her own behalf after her husband had refused to make or consent to the purchase, expecting to pay for the same out of her separate estate, it is not chargeable against the community or the separate property of the husband as "expenses of the family and the education of the children," within Rem. Code, § 5931, in view of other provisions of the same act, giving the wife the right to deal with her own separate property, and providing that the custody and control of the community personal property shall be in the husband, whose separate property shall not be liable for the wife's separate debts.

SAME — SEPARATE PROPERTY — FAMILY EXPENSES — LIABILITY — ACTIONS — TRIAL. In such a case, whether the piano was a family expense was a question of law for the court and not for the jury, and the husband was not liable unless he ratified the sale.

SAME — ACTIONS — ISSUES AND PROOF — ADMISSIONS — INSTRUCTIONS. In an action against a husband and wife upon a promissory note alleged to be given as the sale price of a piano, which was admittedly purchased by the wife for her separate use and not paid for, it is error to instruct that her failure to sign the note warranted a judgment in favor of both defendants, on the theory that the complaint declared upon a note, where the issues were broadened to include her liability on her separate contract to buy the piano for which the note was alleged to have been given.

Appeal from a judgment of the superior court for Grant county, Hill, J., entered October 23, 1917, upon the verdict of a jury rendered in favor of the defendants, in an action on a promissory note. Reversed as to respondent wife; affirmed as to respondent husband.

Charles E. Congleton, for appellant.

FULLERTON, J.—This action was instituted to recover upon a promissory note. In the complaint it is alleged

[1]Reported in 175 Pac. 329.

that the respondents, M. V. Woodard and J. C. Woodard, are wife and husband; that the wife, at Ruff, Washington, on April 26, 1916, made and delivered to the appellant, for and on behalf of the community composed of the respondents, a promissory note wherein and whereby, in her own behalf and on behalf of the community, she promised to pay to the appellant the sum of $599 on November 1, 1916, together with interest at the rate of six per cent per annum, and a reasonable attorney fee in case suit or action should be instituted to collect the note. It is also alleged that the note was given to evidence the purchase price of a Victor Player piano, delivered on the date of the execution of the note; that the piano had been and is used and enjoyed by the respondents jointly, and is a family expense. The prayer is for a recovery against the respondents, and each of them, for the amount of the note with interest, and the further sum of $100 as attorney's fees.

The respondents answered, putting in issue by a general denial all of the allegations of the complaint, save and except the allegation that the respondents were husband and wife. For a further and separate answer they alleged that, on April 26, 1916, the respondent wife entered into a conditional sale agreement with the appellant for a Victor Player piano, at the agreed price of $600; that the agreement was entered into on her own account, she agreeing to pay for the same out of her own separate property, and not for or on behalf of the community composed of herself and her husband; that the respondent J. C. Woodard expressly refused to purchase the piano or to in any way become liable therefor, and refused to permit the same to be purchased for or on account of the community composed of himself and wife; that, if the appellant has a note evidencing the purchase price of the piano signed

by the wife, the same was obtained by fraud in manipulating the papers so as to secure her signature without her knowledge; and that the wife has no knowledge of having signed a note, and denies that she did sign the same. The prayer is that the appellant take nothing by its action and that the respondents recover costs. For reply the appellant admitted the execution of the conditional sale contract, and denied the other allegations of the affirmative answer.

The evidence introduced at the trial, which was had before a jury, tended to support in the main the respondents' version of the transaction. It is not disputed that the husband, when broached to purchase the piano, declined positively to make the purchase; that he did not know for some time after the transaction took place that his wife had entered into a contract for its purchase; that, both before and after that time, he thought the piano was kept in his house in the hope of a sale, and that he ordered the salesman to take it away. The evidence was sufficient, also, we think, to justify a finding that the wife purchased the piano on her own responsibility, intending to pay for it out of funds she expected to derive from property left her by a deceased brother; that this method of paying for the instrument was talked over between herself and the salesman, and that the salesman himself understood that it was from funds so derived that the purchase price of the piano would ultimately be paid. The wife denies her signature to the note, and while a comparison of the signature thereto with her admitted signatures casts a doubt upon her statement, there is testimony in the record tending to show that she signed the note without knowledge of its purport. There is no question, however, that she signed the contract and thus obligated herself to pay for the piano,

promising also in the contract to pay not only interest upon the obligation assumed, but a reasonable attorney fee in case suit or action should be instituted to enforce its payment. The verdict of the jury was for the respondents, and from the judgment entered thereon, this appeal is prosecuted.

It is the appellant's first contention that the obligation sued upon is a family expense chargeable upon the property of both husband and wife, and that the court erred in refusing to so charge the jury, and in refusing to grant his motion for a judgment notwithstanding the verdict. The contention is founded upon § 5931 of Rem. Code, which reads:

"The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately."

This section was enacted by the territorial legislature of 1881, and first appears in our official publications in the code of that year as a part of ch. 183. An examination of the chapter cited will show that the section is a part of a general act relating to the rights of married persons, and contains many other provisions on the same subject-matter with which this section must be read and construed. Among other things, it is provided that neither the husband nor the wife is liable for the separate debts of the other, and that contracts may be made by the wife and liabilities incurred by her which may be enforced against her to the same extent and in the same manner as if she were unmarried. The act also defined what should constitute community property of husband and wife, and gave the husband the management and control of the community personal property, with a like power of disposition as he has of his own separate property, except that he was not permitted to devise by will more

than one-half thereof. Other provisions of the act might be cited as bearing upon the point, but these are enough to show that it was not intended by the section in question to make every article of personal property purchased by the wife and used in connection with the family a family expense. This would be to read out of the act the provision giving the wife the right to deal with her own separate property, and would nullify the provision exempting the husband's separate property from the separate debts of the wife. The section must be read also in connection with the section of the act giving the husband the management, control and disposition of the community personal property. While he may not deny to his family the necessities of life or deny to his children an education, it is manifest that he must have a large voice in determining whether his separate property or the community property shall be liable when the proposed expenditure goes beyond necessities or is not for the education of the children. To hold otherwise would be to deny to him the right which the statute expressly gives him; namely, the right to manage, control and dispose of the community personal property. We cannot think, therefore, that the purchase of this instrument by the wife on her own behalf after the husband had declined to make the purchase, even though used by the family, makes it a family expense chargeable upon either the husband's separate property or the property of the community. The instrument does not partake of the nature, nor is it such a common ordinary household article as to be a subject of purchase by that spouse who can only contract on behalf of the family for the usual and ordinary requirements of the family. It follows that there was no error on the part of the court in refusing to charge the jury that the obligation sued upon was a family expense, or in

refusing to enter judgment for the appellant against the defendant husband notwithstanding the verdict.

It is true also the court refused to submit to the jury as a question of fact whether or not the obligation incurred in the purchase of the piano was a family expense, and that error is assigned thereon. But we find no error in this. In our opinion, the question in the particular case, because of the nature of the evidence, was one of law, not a question upon which opinions might reasonably differ. The court did charge the jury that, if they found that the husband had in any way ratified the purchase, they might find the community liable. This was as favorable to the appellant as the facts warranted.

We have not overlooked the citations from other jurisdictions holding that an obligation incurred by the purchase of a piano is a family expense when the piano is retained and kept for use by the family, and, under statutes containing provisions similar to our own, is chargeable to the property of both husband and wife. But an examination of the cases will show that they are from states where the property of married persons is not held under a tenure like our own, that is, states where the community doctrine of ownership does not obtain. Nor does any of them present the fact of a purchase by the wife over the protest and objection of the husband.

The court gave to the jury the further instruction:

"Should you find from the evidence that the defendant M. V. Woodard did not execute the note set forth in plaintiff's complaint herein, it will be your duty to return a verdict in favor of both defendants herein."

Doubtless the court based the instruction upon the fact that the complaint declared upon a note, and gave the instruction upon the theory that a failure to prove the execution of the note was a failure of proof war-

ranting a finding in favor of the wife as well as the husband. But we think the instruction erroneous nevertheless. The answer and reply broadened the issues made by the complaint, and warranted a recovery against the wife on the obligation assumed by the purchase even though it be true she did not knowingly execute the note. No fraud was perpetrated upon her. The most favorable view of the evidence is that she did not realize, when executing the papers evidencing the purchase of the piano, that she was executing a note. But by her own admission she executed the contract of purchase fully understanding its purport. It is conceded that the obligation assumed has not been met. Plainly, therefore, the appellant was entitled to a judgment against the wife, and the jury should have been so instructed by the court, or, failing in that, the court should have granted a judgment against her notwithstanding the verdict.

The judgment is reversed as to the respondent M. V. Woodard, and the cause remanded with instruction to enter a judgment against her according to the terms of the contract of purchase, the judgment to be executed upon her separate property. In other respects, the judgment will stand affirmed.

MAIN, C. J., MITCHELL, TOLMAN, and PARKER, JJ., concur.

[No. 14776. Department One. September 27, 1918.]

GEORGE SILLMAN, *Appellant*, v. SPOKANE SAVINGS & LOAN SOCIETY, *Respondent*.[1]

CONTRACTS — OFFER AND ACCEPTANCE — CONDITIONAL ACCEPTANCE. An offer to make a loan on condition that the lender write one-half of the fire insurance, does not become binding on acceptance with agreement to write such insurance "upon expiration of present policies," as the acceptance was conditional.

SAME. An offer to make a loan, the lender adding that "we will expect" to write half the fire insurance, adds a material condition that must be accepted unconditionally.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered November 9, 1917, upon findings in favor of the defendant, dismissing an action on contract, tried to the court. Affirmed.

Merritt, Lantry & Merritt, for appellant.

Hamblen & Gilbert, for respondent.

FULLERTON, J. — In March, 1917, the appellant, through his broker, applied to the respondent for a loan of $30,000 for a period of five years, with interest at the rate of five and one-half per centum per annum. In response thereto the respondent mailed to the broker the following letter:

"Spokane, Washington, April 2nd, 1917.
"Mr. C. H. Rogers, care Rogers & Rogers, City.
"Dear Sir: Regarding application for Sillman Hotel loan would state that we will make this loan for five years at 5½ per cent with the privilege of repayments from $1,000 to $5,000 on any interest paying date. We will expect, however, to write at least one-half of the fire insurance carried on the building in our office. Yours very truly,
"J. L. Cooper, Secretary."

[1]Reported in 175 Pac. 296.

The appellant replied personally, his letter being as follows:

"Spokane, Washington, April 19th, 1917.
"Spokane Savings & Loan Society,
"Spokane, Washington.
"Gentlemen: I hereby accept the loan applied for, as per your offer of April 2nd, 1917, to C. H. Rogers, of Rogers & Rogers, my agent. I agree to write twenty thousand dollars insurance through your office upon expiration of present policies. Yours truly,
"Geo. Sillman."

On April 26, 1917, the respondent, by letter addressed to the broker, stated that it was not in a position to make the loan and consequently withdrew its proposition. Thereafter the appellant tendered to the respondent an abstract showing title in himself to the hotel property proposed as security for the loan, together with a note for $30,000, and a mortgage upon the property securing the note, and demanded the completion of the agreement claimed to be evidenced by the letters before quoted. The respondent refused to comply with the demand, whereupon the appellant instituted the present action to recover in damages as for a breach of the agreement. After issue joined the action was tried to the court, who made findings and conclusions in favor of the respondent and entered a judgment dismissing the action. The court founded its conclusion on the ground that the letter of the appellant was not an unconditional acceptance of the proposition made by the respondent, and, in consequence, the respondent's proposition was subject to be withdrawn, and was withdrawn by its later letter to which reference is made.

It is our opinion that the conclusion of the court is well founded. The letter of acceptance is not an unconditional acceptance of the proposition made. The proposal includes the requirement that the respond-

ent be permitted to write one-half of the insurance carried upon the mortgaged property, while the acceptance permits the writing of $20,000 only, and this to be done at the expiration of the existing policies. The proposal with respect to the insurance was a material part of the proposition as a whole, and the appellant, to make his acceptance binding and prevent a withdrawal of the proposition, was as much obligated to accept unconditionally that part of the proposition as he was any other of its parts.

The appellant argues that the reference to the insurance was not a material part of the proposal requiring acceptance; that the word "expect" denotes anticipation rather than demand, and hence did not require acceptance unconditionally. We cannot agree with this conclusion. The primary meaning of the word "expect" is doubtless as the appellant construes it, but the word has a secondary meaning, and its true meaning in any writing, like other words which may be used in varying senses, must be determined from the context of the writing and the circumstances surrounding its making. Here we think it plain that the word was used in its secondary sense of demand, rather than in its primary sense of anticipation. Moreover, this is the construction the appellant himself originally put upon the proposal. In his complaint, in setting forth the contract alleged to have been breached, he averred that the proposal contained two conditions not contained in the original application, one of which was "that the defendant [respondent] should write at least one-half (½) of the fire insurance carried on the building covered by said loan."

We find no error in the ruling of the trial court, and the judgment will stand affirmed.

MAIN, C. J., MITCHELL, PARKER, and TOLMAN, JJ., concur.

[No. 14583. Department One. September 30, 1918.]

L. L. LEE *et al.*, *Appellants*, v. GERARD RYZEK *et al.*, *Respondents*.[1]

JUDGMENT—BAR—PLEADING—NEWLY DISCOVERED FRAUD. An action to modify or vacate former judgments between the same parties on the ground of newly discovered fraud is barred by the former decrees where the complaint contains no allegation of any new fraudulent matter occurring since, or different from, that alleged in the former causes.

TROVER AND CONVERSION—COMPLAINT—TITLE OF PLAINTIFF. A complaint alleging that, after plaintiff's sale and delivery of chattels to a third party, the defendants converted them to their own use, does not state a cause of action for conversion, since the plaintiff had no title or right of possession.

APPEAL—HARMLESS ERROR—PLEADING. While not commendable pleading to refer to records and make them part of a complaint, it is not prejudicial where they only make plain and do not alter the effect of the pleading.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered June 21, 1917, upon sustaining demurrers to the complaint, dismissing an action to modify a judgment. Affirmed.

Charles W. Johnson, for appellants.

Gerard Ryzek, for respondents.

MITCHELL, J.—By an original suit, plaintiffs seek a modification or vacation of a former judgment, so that they may now recover judgment on a note and foreclose a chattel mortgage; and in the event foreclosure cannot be had, then judgment for the value of the chattels alleged to have been converted by these defendants. The note and mortgage were given by the Pasco Theatre Company of Pasco, Washington. In two former suits in the superior court of Franklin county, this same matter has been in litigation and the

[1]Reported in 175 Pac. 297.

same parties involved, except defendant Gerard Ryzek, who is now brought in for the first time. One of the former suits, *Lee v. Pasco Theatre Co.*, was brought to this court, the decision being reported in 93 Wash. 204, 160 Pac. 435. In the present case the amended complaint sets up, and by reference incorporates into it, the former litigation, including the decision of this court just mentioned. The defendants answered separately, and in addition to general denials, each also affirmatively pleaded the proceedings in the two former suits, including the decision of this court. Reply was filed to these answers. Thereupon defendants separately moved for judgment on the pleadings, and also demurred to the amended complaint. The trial court sustained the demurrers. Plaintiffs elected to stand upon their amended complaint and the cause was dismissed as to J. A. Ryzek and John Ryzek. At the same time, upon motion of plaintiffs, the cause was dismissed without prejudice as to defendant Gerard Ryzek. Plaintiffs appeal.

Appellants, in their amended complaint, contend they have discovered fraud which now entitles them to maintain this action. It is apparent, however, and the trial court held, that there is no allegation of any new fraudulent matter, so far as J. A. Ryzek and John Ryzek are concerned, occurring since, or different from, that alleged in the former causes, the judgments in which now preclude appellants as to respondents John Ryzek and J. A. Ryzek. We are relieved of the tediousness of analyzing and paralleling the present amended complaint with the issues in the two former suits and the decision of this court referred to in the amended complaint, because in that decision will be found a full statement and determination of the controversy. We are of the opinion that plaintiffs, as shown by their amended complaint, are precluded and

barred by former judgments from any recovery on the note and chattel mortgage.

As to the complaint in conversion, after alleging sale and delivery of the chattels by appellants to the Pasco Theatre Company, it is then alleged:

"That the defendants herein immediately took and converted said described property to their own use subject to the plaintiffs' lien and have at all times used and enjoyed the same without making any payment therefor to these plaintiffs or to any other party whatsoever."

Thus it appears that appellants did not have title, general or special, possession or right of possession of the chattels at the time of the commencement of the suit, and hence are not in a position to maintain an action in conversion. *Binnian v. Baker,* 6 Wash. 50, 32 Pac. 1008. Again, this very matter of the rights of John Ryzek and J. A. Ryzek to this personal property has been disposed of adversely to appellants heretofore, as shown by the decision of this court already mentioned.

As supplemental to the transcript in this case, respondents have furnished copies of the pleadings, orders and judgments in the two former cases between these parties and of the decision of this court. Appellants move to strike these from the record, claiming they are not properly a part of it. In the amended complaint, as already seen, they specifically refer to both of the other causes and the results therein, and also the decision of this court, and state that by such reference they make the same a part of their amended complaint. We do not commend this manner of pleading, but appellants are not in a position to object to the certified copies sought to be stricken. They only make plain, and in no sense alter the effect of, the amended complaint; and the same may be said of the

decision of this court referred to. The motion to strike is denied.

Judgment affirmed.

MAIN, C. J., FULLERTON, PARKER, and TOLMAN, JJ., concur.

[No. 14802. Department One. September 30, 1918.]

JAMES JOHNSON, *Respondent*, v. OSCAR GOODENOUGH *et al.*, *Appellants*.[1]

APPEAL—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY. The amount claimed, and not the amount recovered, determines the jurisdiction of the supreme court in actions at law for the recovery of money, under Const., art. 4, § 4, limiting the same when the original amount in controversy does not exceed $200.

APPEAL—RECORD—EXHIBITS. It is not essential that a bulky exhibit be physically attached to the statement of facts, when sent up with the record and referred to in the statement and identified in the judge's certificate.

CORPORATIONS—STOCK—CONTRACT OF SALE—DIVIDENDS—CONSTRUCTION. Where the by-laws of a warehouse company provided for two kinds of dividends, (1) a flat rate based on the shares of stock, and (2) participatory in surplus in proportion to the volume of business done by members, a sale of shares in which the buyers agreed to pay the seller any dividends due upon his stock, applies only to the flat or stock dividends, and does not render them liable for subsequently declared participatory dividends in which the seller was treated by the corporation as a non-member; since the by-laws imposed the condition of doing business with the company to share in the participatory dividend, irrespective of owning stock; and his remedy, if any, was against the corporation declaring the dividend, and not against the stockholders upon their contract of purchase.

SAME. In such a case, it would be incumbent on the seller to show the amount of business transacted by participating members and by himself, in order to show the amount he would be entitled to on a participatory dividend.

[1]Reported in 175 Pac. 306.

Appeal from a judgment of the superior court for Adams county, Mills, J., entered August 11, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover dividends on corporate stock. Reversed.

Burcham & Blair and *Adams & Naef*, for appellants.

Chas. W. Johnson and *Edward A. Davis*, for respondent.

FULLERTON, J.—In 1909, the respondent, Johnson, with others, organized a corporation known as the Producers Union Warehouse Company, the respondent subscribing for eight shares of stock therein. The organizers of the corporation were wheat growers, and the object of the corporation was to buy and sell wheat and deal in fuel and such other commodities as its organizers ordinarily used. Two forms of dividends of the earnings of the corporation were provided for in the by-laws of the organization, one a flat dividend on the corporate stock not to exceed twelve per centum of the face value of the stock, and the other a division of the surplus remaining after deducting the twelve per centum, a sum to cover depreciation and bad debts, and such further sum as the directors might deem it advisable to set aside as a reserve account; the sum so remaining to "be divided among the members in proportion to the volume of business, wheat expressed in bushels, merchandise in dollars, done by each member with the company." In the year 1914, the respondent, while a stockholder, delivered and sold to the corporation some 15,000 bushels of wheat. On February 24, 1915, he sold his shares of stock to the appellants, Goodenough and Minnick, six shares to the first named and two to the last. At the time of the sale, the respondent had misplaced the certificate is-

sued by the corporation evidencing the shares, and made affidavit to that effect, also executing to each of the purchasers a bill of sale of the number of shares transferred to them severally. The bills of sale purported to convey the stock absolutely, without reservation of any kind.

Subsequent to the sale of his stock by the respondent to the appellants, the corporation sold its business to another corporation. At about the same time, it declared and paid a dividend upon its stock to its then stockholders of twelve per centum on the face value thereof. This left a surplus of $10,789, $10,500 of which was divided among the stockholders under the second form of dividend provided in the by-laws. This dividend, because based upon the number of bushels of wheat delivered to the corporation by the participating members as well as upon the amount of business transacted by the member with the corporation, was not distributed on the basis of an equal percentage to each member. While it is stated that some seventeen members participated in it, the percentum of the sum divided received by the several members other than the appellants is not shown. In the division, Goodenough received a sum total of $1,711.67, and Minnick a sum total of $799.82. In making the dividends, the respondent, Johnson, was treated as a non-stockholder, neither the amount of the wheat delivered by him to the corporation nor the amount of business transacted by him with it prior to the sale of his stock being taken into account.

The present action was instituted by Johnson in May, 1916. He sued the appellants jointly, and after alleging in his complaint his former ownership of shares of stock in the warehouse company, his delivery to the company of 15,000 bushels of wheat and the sale of his stock to the appellants, further alleged that

he was entitled to a dividend or participatory profit on such delivery amounting to $1,350, and that the appellants purchased the stock from him with the express understanding and agreement that any dividends due upon the stock sold should remain in the seller and would be paid to him; further alleging that the defendants received the dividend and converted it to their own use. The appellants answered separately, denying the material allegations of the complaint. The cause was tried to a jury. In his evidence given at the trial, the respondent did not contend that the dividend paid on the face value of the shares of stock was reserved in the transfer of the stock, but only such sum as might be paid on the distribution of the surplus profits, the second form of dividend provided for in the by-laws. At the conclusion of the trial, a challenge to the sufficiency of the evidence to justify a verdict was interposed by the appellants, which the trial court overruled. The cause was later submitted to the jury and a verdict returned, finding against the appellant Goodenough in the sum of $216, and against the appellant Minnick in the sum of $102.60. On the return of the verdict, the appellants moved for judgment in their favor *non obstante*. The court denied the motion, but held that the verdict against Goodenough should not have exceeded $190.21 and that against Minnick $89.37, and tendered to the respondent the alternative of taking judgment against the appellants severally for the respective amounts or submitting to a new trial. The respondent elected to take judgment for the reduced sums, and judgment was entered accordingly. This appeal is from the judgment so entered.

The respondent moves to dismiss the appeal on the grounds, first, that the amount in controversy is not

within the jurisdiction of this court; and second, because the statement of facts does not contain all of the evidence.

The first ground of the motion seems to be based on the contention that the amount of the recovery, not the amount in controversy, determines the jurisdiction of this court on an appeal. But such is not the rule. The constitution (art. 4, § 4) provides that this court shall have appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of $200. The present action manifestly is a civil action at law for the recovery of money in which the original amount in controversy exceeds the sum of $200. The amount in controversy is determined by the allegations of the complaint, and the allegations therein relating to the amount will be held to govern in determining the right of appeal, unless it is clear they were made in bad faith or in attempt to confer jurisdiction when it otherwise would not exist. The respondent, of course, does not assert that his demand for $1,350 was not made in good faith.

The second ground for dismissal is also without merit. The evidence pointed out in the brief as not in the record is a certain exhibit numbered 4; but we find it in the record. True, it is not physically attached to the statement of facts; from its bulky nature it could not well be so attached, but it is referred to in the statement, and the trial judge has attached thereto a certificate to the effect that it is an exhibit in the case, making reference to the particular page of the statement of facts wherein is contained the record of its admission in evidence. This is sufficient.

On the merits of the controversy, it is difficult to see on what principle a recovery can be had against the appellants. Since the respondent does not claim a reservation of the dividends paid upon the face value of the stock, and since the second form or participatory dividend was made without reference to the number of shares of stock held by the stockholder, but upon the number of bushels of wheat the stockholder delivered to the corporation and the amount of business he transacted with it, it is plain that the appellants acquired no advantage over other stockholders in virtue of their purchase of the respondent's stock. In other words, the number of shares held by the individual stockholder was not taken into account when making the dividend. Nor did the appellants by the purchase of the respondent's stock acquire directly any of the rights the respondent would have had in the participating dividend had he remained a stockholder. The respondent sold his shares before the participating dividend was made, and in making the dividend he was treated by the officers of the corporation as a non-shareholder. By purchasing the stock, therefore, the appellants acquired only an indirect benefit; that is to say, by the elimination of the respondent's interests the amount of the dividends was distributed over lesser interests than it otherwise would have been, and the appellants received their proportionate shares of the difference.

But the fact that the dividends of the appellants may have been increased in this indirect manner by the purchase of the respondent's shares does not, we think, give him a right of action against them. It may be that the respondent, in the sale of his shares, could have vested the right in the purchaser to collect the dividend for his use, and could have recovered against them had they done so, but this he did not do. He sold

the shares, reserving the right to participate in the dividends, thus preventing the purchasers from claiming his proportionate share. Any claim he has for this share, therefore, must exist against the corporation, and clearly he cannot maintain an action at law against these appellants for the corporation's account, at least until he shows that he has exhausted his remedies against the corporation or that pursuit of the corporation would be useless. This he has not done. On the contrary, his proofs expressly show that he has made no attempt to pursue the corporation, and show further that the corporation has on hand funds ample to meet the obligation, if the recovery against the appellants measures his true right.

Again, we think the respondent is barred from a right of recovery by the by-law of the corporation before referred to. This by-law, as will be seen, imposes two conditions on the right to share in a participating dividend; first, the person claiming the right must be a stockholder in the corporation, and second, he must have transacted business with the corporation. A stockholder is thus permitted to participate in this dividend because of his status. While the ownership of the stock is made necessary in order to so participate, the dividend is in no sense a dividend on stock. A sale of the stock without a sale of the rights following it, therefore, merely destroys the status; it does not carry with it anything more than the results usually following sales of stock. As the by-law was not a new creation, but was enacted when the respondent was a stockholder in the corporation, he was bound to take notice of it and could not, by his own contracts, change its purport or effect. When, therefore, he parted with his stock, he did not reserve to himself any right to the dividend, since ownership of the stock and the right were not separable.

But were we to waive the foregoing objections, a recovery must fail for want of sufficient data upon which to compute the amount of the recovery. Since the problem for determining the sum due has as one of its factors the entire amount of business transacted with the corporation by the participating members, plus the amount of business transacted with the corporation by the respondent, it was incumbent on the respondent to show the sum total of such business. This he did not do. He showed only the sum total of his own business and the percentage awarded the participating members, seemingly in the belief that the percentage of distribution would remain the same were his business also taken into the account. It, of course, requires no mathematical demonstration to show that this method of making the calculation leads to an incorrect result.

For the reasons stated, the judgment is reversed, with instructions to grant the appellants' motion for judgment notwithstanding the verdict.

MAIN, C. J., MITCHELL, PARKER, and TOLMAN, JJ., concur.

[No. 14816. Department Two. September 30, 1918.]

CARNATION LUMBER & SHINGLE COMPANY, *Appellant*, v. TOLT LAND COMPANY *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER—OPTION CONTRACT—TITLE—APPROVAL BY MORTGAGEE—CONSTRUCTION. Where lumber and shingle mill property, mortgaged to a bank for $23,177.50, was leased at $300 per month, with option to purchase by warranty deed for $18,750 if taken within two years, or for $14,000 if taken in eighteen months, and the bank, which was a party to the negotiations, made indorsement on the contract that it "ratified, confirmed and approved" all of the terms of the agreement, rent being paid to the bank, the effect of the contract and indorsement was to charge the vendor and the bank with the burden of conveying by good and sufficient deed, free of the mortgage, if the option to purchase were exercised.

INSURANCE—OPTION CONTRACT—APPLICATION OF INSURANCE MONEY—SPECIFIC PERFORMANCE—EQUITY. In an action for the specific performance of a contract to convey property leased with option to purchase, insurance money paid on policies written in the names of all the parties interested must be applied as their interests may appear; and where a mortgagee had approved the contract and was with the vendor charged with the burden of conveying by good deed, free from the mortgage, the insurance money must be credited to the vendee upon the purchase price, where the option to purchase had been exercised; since equity takes no account of a change in form or character of property.

SAME. In such a case, the parties contracted against the rule that under a mere executory option, insurance money goes to the owner, where the contract provided that the purchaser should keep the property insured for at least $14,000 payable to the vendor as its interest may appear, and gave the purchaser the option to apply the proceeds of the policies to repairing or rebuilding.

VENDOR AND PURCHASER—TENDER. A tender of the sum due upon exercising an option to purchase leased land may demand that infirmities in the title disclosed by the abstract be cleared to comply with the vendor's contract to convey a good title.

VENDOR AND PURCHASER—LEASE AND OPTION CONTRACT—FORFEITURE—WAIVER. Acceptance of rent for a specified month, under a lease containing an option to purchase, is a waiver of any prior default as ground for forfeiting the contract.

[1]Reported in 175 Pac. 331.

SAME—OPTION CONTRACT—FORFEITURE. An attempted forfeiture of a lease and option to purchase after tender of the purchase price is futile.

SAME—LEASE AND OPTION CONTRACT—ABANDONMENT. Evidence of intent by the lessee to abandon property leased with option to purchase cannot be gathered from the conduct of the vendor and third persons.

PARTIES—INTERVENTION—PERSONS ENTITLED. A townsite company, interested in the sale of its lots and therefore in the operation of a shingle and a sawmill that were the subject of sale, is not entitled to intervene and contest plaintiff's action to enforce specific performance of the sale.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 17, 1917, in favor of the defendants, dismissing an action for specific performance, tried to the court. Reversed.

Edgar C. Snyder and *Farrell, Kane & Stratton,* for appellant.

J. A. Coleman, S. H. Kelleran, Jesse Simmons, Almon Ray Smith, and *Piles & Halverstadt,* for respondents.

CHADWICK, J.—Following the lead of counsel, we shall refer to the appellant as the plaintiff, the Tolt Land Company as the land company, the National City Bank of Seattle as the bank, and the Tolt Townsite Company as the townsite company, or collectively as the several defendants.

On and prior to the 20th day of May, 1916, the land company was the owner of certain property consisting of a one-acre tract upon which was a shingle mill, and a five-acre tract adjoining upon which was a sawmill. The bank was the holder of two notes which had theretofore been made by the land company and indorsed by the townsite company. The aggregate balance due on these notes at the time was $23,177.50. Both of these notes were secured by mortgages made by the

land company to the bank. On the day mentioned, one Burnett and the land company entered into a contract of lease and option to purchase, whereby the land company leased to Burnett and his assigns the two tracts, together with the shingle mill and sawmill situate thereon, also all of the machinery and equipment therein contained, for a term beginning June 1, 1916, and ending May 31, 1918, at a monthly rental of $300 per month, with the privilege of purchasing at a price of $18,750 if taken within two years, and at a price of $14,000 if the option were exercised within eighteen months after June 1, 1916.

It was further provided that Burnett or his assigns should keep the property insured at all times in an amount not less than $14,000, with loss payable to the lessor "as its interests may appear." That part of the lease providing for the application of disposition of insurance moneys in case of a loss is as follows:

"If the said property, or any of it, shall be destroyed or damaged by fire during the term of said lease, the insurance money received shall be devoted to the repairing or rebuilding of said property, if the party of the second part, or his assigns, shall determine that the application of same for said purpose will sufficiently reconstruct said property for the second party to continue operating under said lease and will so notify the party of the first part."

The contract further provided that, if Burnett or his assigns should exercise their option to purchase within the time agreed upon, the land company would convey the two tracts by "a good and sufficient warranty deed or deeds and would execute all other instruments necessary to effect the terms of the agreement."

Burnett paid the sum of $900, being three months' rent in advance, at the time the contract was executed. The bank, having a money interest in the transaction

as mortgagee, and to the extent of the full purchase price in case the option were exercised, and having been a party to the negotiations between the parties leading up to the execution of the writings, which were submitted for its approval, indorsed upon the contract the following:

"We, the undersigned, holders of valid subsisting lien claims against the property referred to in the foregoing agreement and fully described in the certain lease to which reference is made in the said foregoing agreement, do hereby, in so far as our interest appears, fully ratify, confirm and approve all of the terms and conditions of the said agreement and the said lease.

"Dated at Seattle, Washington, May 20th, 1916.

"National City Bank.

"(Corporate Seal) By J. W. Maxwell, pt.

"J. W. Maxwell."

After the papers had been executed, Burnett assigned his interest to the plaintiff, a corporation organized for the purpose of taking over the property and of which Burnett is the principal stockholder. The sawmill was not operated, but the shingle mill was operated to a certain extent.

The mills were somewhat in disrepair and plaintiff was put to some delay, annoyance and expense in putting them in shape for operating. In consideration of this delay and expense the land company, with the approval of the bank, allowed a credit for two months' rent, which carried the rent payments over September and October, 1916.

After plaintiff had taken possession of the property, it encountered a claim of the Puget Sound Machinery Depot for $1,520, which was due from the land company for machinery which it had purchased under a conditional bill of sale and put in the mill. The claim was questioned to a certain extent by the company and

denied as an obligation by plaintiff. Pending a settlement no rent was paid. The machinery company finally took steps to enforce its claim through legal proceedings. A compromise was then reached, the amount due the machinery company was paid by plaintiff and allowed as rent to the extent of $1,390; plaintiff then paid $710 in money, being $2,100 in all, to the bank. It was received and credited upon the rent account. This paid the rent up to April 1, 1917. On April 2, $300 was paid by the plaintiff to the bank as rent for the month of April. On the 11th day of January, 1917, the shingle mill was partly destroyed by fire. The policies had been written in favor of the plaintiff, the land company and the bank. A dispute arose as to the distribution, application and ownership of the money realized upon the policies, and checks were therefore issued by the insurance companies payable jointly to the several claimants. These were indorsed by the parties and the proceeds paid into the First National Bank of Seattle under a stipulation that the money should be held subject to the decree of the court in this action.

A few days prior to the making of the deposit of the proceeds of the insurance policies, plaintiff undertook to exercise its option. The balance due, after crediting all sums paid as rent, was $10,700. This sum was tendered to the bank and to the land company under a tender which recites: "this tender being made firmly and nonconditionally, save only as to the following requirements, compliance with each and all of which is hereby demanded of you." The requirements were:

"First, a warranty deed from the land company.

"Second, a bill of sale of the personal property from the land company.

"Third, either a satisfaction or release of the mortgage held by the bank or a quitclaim deed from the bank.

"Fourth, a full discharge and release of said property from the liens of certain judgments.

"Fifth, assignments to the plaintiff by the land company and the bank of all interest in the proceeds of the insurance policies.

"Sixth, payment to the plaintiff of $199.45 deducted by one of the insurance companies from the adjusted loss under its policy, under claim by that insurance company of an obligation to it from the land company wholly independent of the policy involved.

"Seventh, indemnity against any judgment in King county superior court cause No. 116025.

"Eighth, payment of the 1915 taxes."

The defendants were further notified that the tender would be kept good by bringing suit and paying the money into the registry of the court, unless compliance was had with the several demands or conditions. The tender was refused and plaintiff brought this action to compel specific performance. A short time after the action had been brought, the land company gave notice to the plaintiff that it had forfeited the contract for the nonpayment of the rent for May, June and July, 1917; the court below held in favor of the several defendants, and from a decree dismissing plaintiff's complaint, this appeal is prosecuted.

It is the contention of the several defendants that plaintiff has forfeited its contract by the nonpayment of rent; that it abandoned the property; that it now has no interest in the proceeds of the insurance policies, and that it cannot now maintain a bill for specific performance.

Waiving for the time the questions of forfeiture and abandonment, the case really comes down to this: Whether the bank, having mortgages on the property,

agreed to release its mortgages in the event plaintiff exercised its option to purchase.

The case was tried on the theory that the contract and the indorsement made by the bank and Mr. Maxwell was a sufficient declaration of intention that the bank would release the mortgages so that the company might convey by a good and sufficient warranty deed. After the testimony had closed, the trial judge made some intimation that, in his judgment, the contract was not sufficient in terms or form to bind the bank to a release of the mortgages. Whereupon counsel for plaintiff asked leave to amend, setting up a mutual mistake in that the parties had omitted to incorporate their express agreement to that effect when the indorsement was written. The court took further testimony upon this issue, but it is our judgment that this can in no way affect the rights of the parties or the controlling equities. The contract, together with the indorsement by the bank, is in itself sufficient to charge the land company and the bank with the burden of conveying by good and sufficient deed free of all mortgages or subsisting liens held by the bank or Mr. Maxwell at the time the contract was entered into.

The first and best resort in the construction of contracts is to put oneself in the place of the parties at the time the contract was executed—to look at it in prospect rather than in retrospect—for, when money disputes have arisen, the perspective is apt to be clouded by the unexpected chance of gain or self-interest.

On the 26th day of May, 1916, the land company owned the property which plaintiff desired to lease with an option to purchase. It was willing to lease at $300 per month, and to sell within eighteen months at $14,000 and within two years at $18,500. A contract was entered into and signed by the parties. The

bank, having a financial interest, agreed that the contract might be entered into. It became, in a sense, a party to the contract. As the holder of mortgage liens, it knew of and approved a contract which, if carried out, would result in a sale of the property at $14,000, or at most, $18,500. It knew that the rent and purchase price would be paid to it, and that, if the option were exercised, the purchaser was entitled under his contract to a "good and sufficient warranty deed or deeds." As the holder of "subsisting mortgage liens," it knew the purpose of the vendor and the object of the buyer. It knew that the vendor was to take $14,000, in event, etc., as the full purchase price, and that the purchaser expected to get a title free of "subsisting mortgage liens;" that, if the option were exercised, it would receive the purchase price in part payment of a debt for which it had only "doubtful security." We cannot understand how it can be contended otherwise. But, say counsel, it would be to charge Mr. Maxwell with a lack of all business acumen to say that he would release the property upon payment of $14,000 when he had a subsisting mortgage for $21,800. But this is *non sequitur*. If the security was doubtful, it may be that the property was not worth to exceed the sale price. Some men have been content to take a chip or a whetstone in full payment of substantial obligations. Or it may be that, having "other securities to fall back on" and having faith in them, the creditor would be willing for the debtor to sell at its own price. But to exempt Mr. Maxwell of the imputation of careless conduct would be to charge his adversary with imbecile disregard of his affairs. It would be to say that he contracted to pay $14,000 and take the property subject to a mortgage of $21,800; and if he eventually got the title that would follow a "good and sufficient war-

ranty deed," that is, a deed with full covenants, he would have to pay $35,800.

But it is not for us to try out the business ability of the contracting parties. Whatever their capacity, they have made their own contract and for themselves. As was so well said by that sturdy yeoman of the law, the late Judge Dunbar:

"These parties have made a law for themselves," and "but we are convinced that as long as people are privileged under the law to make contracts for themselves, if they are unwise enough to make contracts which are burdensome, the law cannot relieve them. . . . . They solemnly executed this contract, and in the absence of fraud it is conclusively presumed to speak the minds of the contracting parties. Any other construction would destroy the force and effect of all written obligations and leave everything to the chance of slippery memory, the very thing which a written contract is intended to guard against." *Pease v. Baxter,* 12 Wash. 567, 41 Pac. 899.

And, as there held, whether we give the approval of the holder of subsisting liens of a contract to convey at a certain price by a good and sufficient deed a technical meaning or the meaning ordinarily given to such words, the conclusion is irresistible that the bank agreed to accept the purchase price and discharge its lien.

Neither is the bank entitled to hold as its own or as a payment on the debt of the land company the proceeds of the insurance policies. The greater portion of the briefs are taken up with a discussion of the rights of the parties under option contracts to take the proceeds of insurance policies. It is asserted that, under the great weight of authority, if the contract be a mere option and not a present sale, no element of title, either legal or equitable, is in the optionee, and the

contract being wholly executory and subject to breach at will, that the proceeds of a policy goes to the owner. With this rule we have no present quarrel, but it does not measure this case.

This is a suit in equity, and the only object we have is to compel the doing of such equity as grows out of the contract. The subject-matter of the sale was the land, the mills and machinery. The policies were made out in the names of the several parties to this suit, and if there were no other provision for the distribution of the insurance moneys, the laws would supply the words "as their interests may appear." It may be granted that the purchaser or the plaintiff would not be entitled to the insurance money if it had not exercised its option, but when it exercised its option it was entitled to the benefit of its bargain. That is to say, if the mills with the machinery, or if any of them, had been destroyed in whole or in part by fire, it is entitled to the insurance money, for equity will take no account of a change in form or character of property. This works complete equity between parties to this suit, for it gives to the purchaser his value in property, and with the payment of the money into the registry of the court, the bank will satisfy the contract and give to the purchaser and the land company all that it demanded.

Our conclusion consists with paragraph 3 of the contract. It was agreed that the purchaser should keep the property insured for at least $14,000, payable to the land company as its interests may appear. The covenant to insure was for the benefit of the security. In this connection, paragraph 3 of the contract may be re-read.

So that, granting the rule contended for by counsel, it is plain that the parties contracted against the rule,

and the purchaser had option to apply the proceeds of the policies to repairing or rebuilding. Paragraph 3 can bear no other meaning than that the integrity of the security should be maintained, either in money or in property, pending the exercise of the option or the payment of $14,000 which would terminate the contract rights of the parties. The prime purpose of the land company and the bank was the payment of $14,000, and they can have no possible interest in the source of the payment.

It would be idle to pursue the abstract propositions advanced by counsel, for, as it has been said, the parties have made the law of their case, and to give either party a right or an advantage that is not reserved in the contract would be doing a wrong which, in theory at least, equity is incapable of doing.

Neither do we find merit in the contention that the tender was not good. The contract provides:

"If and when the party of the second part, or his assigns, shall exercise the privilege of purchase, herein granted, and shall pay the purchase price in full, as herein stipulated, then the party of the first part shall, and hereby agrees to, convey said property to the party of the second part, or his assigns, by good and sufficient warranty deed, or deeds, and the party of the first part further agrees to execute such other instruments or documents as may be necessary to fully effect the terms of this agreement."

If the abstract disclosed infirmities that put suspicion upon the title, it was the right of appellant to demand that they be cleared before accepting a deed. We understand that the items complained of are disposed of, in any event, and are no longer a subject of controversy.

The attempted forfeiture was unavailing. The acceptance of the April rent was a waiver of any prior

default, if the default had not been otherwise explained, and the attempted forfeiture after the tender of the purchase price was futile.

It is claimed that plaintiff abandoned the contract and the property. Without reviewing the facts in detail, it is enough to say that, while it is true that the land company put some machinery in the mill and the railway company tore out its spur, we find no evidence of intent on the part of the plaintiff to abandon. Its intent is to be gathered from its conduct, and not from the conduct of the land company or third parties.

The Tolt Townsite Company intervened on this theory; that it is the owner of the townsite and the property remaining unsold in the town of Tolt; that it is to its interest that the mills should operate, and that there was a sort of understanding between it and the land company that the mill should continue to be operated, and that this was the cause moving it to become a surety for the land company upon the notes held by the bank; and there being no certainty or assurance that the plaintiff will operate the mills, and specific performance being a matter of grace to be exercised within the sound discretion of the court, and not at all if the decree would operate to the injury of innocent third parties, the court ought now to deny a recovery because of possible harm to it. It seems to require no argument to meet this contention. The townsite company was not a party to the contract, nor can we assume that the plaintiff will not operate the mills. On the contrary, the presumption is that it will operate the mills, as it is not likely that it would pay $14,000 for two pieces of property, one of which is vacant and the other idle, with no intention of turning its bargain to account.

The plea of the townsite company cannot be sustained upon legal or equitable grounds.

The decree of the lower court is reversed. The case will be remanded with instructions to enter a decree of specific performance.

MAIN, C. J., HOLCOMB, MOUNT, and MACKINTOSH, JJ., concur.

[No. 14740. Department One. October 1, 1918.]

W. R. DAVENPORT, *Respondent*, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Appellant*.[1]

CARRIERS — PASSENGER DEPOTS — REGULATIONS — REASONABLENESS. Railroads having the right at common law to enforce reasonable rules for the conduct of business, and the railroad commission having adopted no rules as to the time for keeping a company's station rooms open, as empowered by Rem. Code, § 8626-85, a passenger, in order to recover damages from a company's failure to keep its waiting room open between the hours of 4:30 and 8 a. m., must allege and prove that its rules providing therefor are unreasonable.

SAME—PASSENGER DEPOTS — ACTIONS FOR DAMAGES — DEFENSES—EVIDENCE. In an action for damages by a passenger through a railroad's failure to keep its waiting room open, the defendant, under a general denial, is entitled to prove that the closing was in accordance with its regularly established rules, and facts tending to show its reasonableness, including the fact that the public service commission had adopted no rule on the subject.

SAME—PASSENGERS—EJECTION—DAMAGES—MENTAL ANGUISH. The fact that a passenger was told that he would "have to get out of here," on closing a waiting room, is not sufficient to carry the case to the jury upon the issue of suffering mental anguish from insulting language.

DAMAGES—PERSONAL INJURIES — EXCESSIVE VERDICT. A verdict for $832 for damages through catching a cold is excessive, where the evidence showed nothing beyond the usual discomfort usually caused by such condition.

Appeal from a judgment of the superior court for Grant county, Hill, J., entered September 25, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

[1]Reported in 175 Pac. 298.

Geo. W. Korte and *R. M. Dye,* for appellant.

W. E. Southard, for respondent.

TOLMAN, J.—The appellant is the owner of a railway running from Seattle through Warden, Washington, and eastward; and also of a connecting line which runs from Warden to Ruff, Washington, and other points.

The respondent, on January 31, 1917, purchased a ticket from the appellant's agent at Seattle which entitled him to transportation from Seattle to Ruff, Washington. On the evening of that day he boarded one of the appellant's trains at Seattle, upon which he was carried to Warden, where it was necessary for him to change trains. The respondent arrived at Warden on the main line passenger train at about 4:15 a. m. on February 1, 1917. The train on the branch line did not leave Warden until 8 a. m. The respondent left the main line train at Warden and went into the waiting room owned and maintained by the appellant, to await the departure of the train for Ruff. At that time the appellant employed to handle its business at the station at Warden two men. The day man worked from 8 a. m. until 5 p. m., when the night man came on duty, remaining from 5 p. m. until 6:30 p. m., when the depot and waiting room were closed, and were reopened again at 11 p. m., when the night man came on duty and kept open until 4:30 a. m., the depot being then closed until 8 a. m.

These hours of duty and of keeping open the waiting room were, it is claimed by the appellant, fixed by the rules and regulations promulgated by it some time before, and which were in full force and effect and posted on the blackboard in the waiting room where they could readily be seen.

At about 4:30 a. m. on the morning in question, while the respondent and one other person were in the wait-

ing room, the appellant's agent then in charge informed the respondent that he was about to close the depot and waiting room and that the respondent would have to leave and go to the hotel. At that time there were two hotels located in Warden, one about a block from the depot, and the other about two and one-half blocks from the depot, both of which were kept open so that any one might enter the office, but neither had a night clerk, and one entering the hotel would have to ring a bell provided, in order to receive attention.

At the time the appellant's agent informed the respondent that he must leave the waiting room as it was to be closed, the respondent claims to have shown the agent his ticket and informed him that he was a through passenger for Ruff, though this is denied by the agent. In any event, without any force or violence of any kind, and without any insulting or abusive language or conduct upon the part of the appellant's agent, the respondent vacated the waiting room upon the request or demand of the agent, and the door was locked. The respondent claims to have stood outside discussing the situation for a few moments with the other person who was ordered from the waiting room at the same time, and then to have gone to a nearby hotel where he received shelter until about 6:30 on the same morning. The weather was cold, the temperature being at about zero, and the respondent had no overcoat, and he says he was not dressed so as to remain exposed to the cold.

At about 6:30 a. m., the respondent voluntarily left the hotel, returned to the station, which was still locked, and remained there on the outside in the cold voluntarily for a considerable time before the arrival of the train upon which he was to become a passenger. He alleges that he contracted a severe cold and became sick and distressed, and suffered great physical pain

as a result of thus being denied shelter in the appellant's waiting room. In addition to claiming damages in the sum of $750 therefor, he asks further damages in the sum of $1,000 for mental pain and anguish suffered as a result of the alleged insulting and insolent manner in which he was ordered from the waiting room.

The case was tried to a jury, which returned a verdict in favor of the respondent in the sum of $832. The appellant moved for judgment notwithstanding the verdict and for a new trial, which motions being denied, the case is brought here on appeal.

Under the common law, railroad companies have the right to make and enforce rules and regulations for the conduct of their business, subject only to control by the courts as to the reasonableness of such rules and regulations; and with this limitation, a carrier of passengers has the right to make such reasonable rules and regulations as may seem fit and proper for the conduct of its business. 10 C. J. 650, and cases there cited.

In this state, by statute, Rem. Code, § 8626-85, the public service commission is empowered to adopt and issue rules and regulations covering, among other things, "the time that station rooms and offices shall be kept open." There is no allegation or proof that the public service commission, at the time complained of, had adopted any rule covering the time when the appellant's station room at Warden should be kept open. This tends toward a presumption that the appellant's rules and customary practice with reference thereto were reasonable, and that no action by the commission was required. It follows, therefore, that, in order to recover in this case, the respondent must have alleged and proved that the appellant's action in clos-

ing its waiting room between the hours of 4:30 and 8 a. m. on the morning in question was unreasonable.

Assuming that the complaint, liberally construed, does so charge, and that the respondent's evidence tends to so show, we think that, under the general denial of the answer, the appellant should have been permitted to prove that the closing of the waiting room at the time in question was in accordance with its regularly established rule, and to offer in evidence any facts tending to show the reasonableness of the rule, including the fact that the public service commission had adopted no rule governing the subject. And the jury should have been given instruction No. 2 proposed by the appellant.

We find no evidence in the record which justifies the submission to the jury of the question of whether or not the respondent suffered mental anguish and was damaged thereby. His own testimony fails to show any violence of word or act, or any insulting or abusive language used. We cannot hold that the mere statement by the appellant's agent, "You fellows will have to get out of here, I am going to lock up," even though respondent says, "I did not see why he should treat me like that; my feelings were hurt and I can't hardly explain how I did feel," is sufficient to carry this question to the jury. The appellant's motion to withdraw this question from the jury should have been granted.

The verdict should have been set aside as excessive upon the appellant's motion for a new trial. There is little if any evidence from which the jury might find that the respondent suffered loss of time or earning capacity; and a cold, even if severe, does not usually cause great suffering. The testimony in that respect shows nothing beyond the discomfort usually caused by such a condition. We can find no evidence in the

case which will sustain a verdict and judgment for more than a very inconsiderable amount.

The judgment of the court below will be reversed with instructions to grant a new trial.

MAIN, C. J., PARKER, MITCHELL, and FULLERTON, JJ., concur.

[No. 14428. *En Banc.* October 1, 1918.]

MAUD MORRISON, *Administratrix etc., Respondent,* v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Appellant.*[1]

MASTER AND SERVANT—INTERSTATE COMMERCE—EMPLOYERS' LIABILITY ACT. A foreman in charge of a building and bridge gang is not employed in interstate commerce, within the meaning of the Federal employers' liability act (35 Stat. 65), while he was engaged in unloading concrete tiling to be stored for future use in replacing wooden culverts, the place and time of its use being indefinite; since it did not directly and immediately tend to facilitate the movement of interstate commerce.

SAME. In such case, the fact that the tiling was part of an interstate shipment, and was being unloaded a very short time after its arrival, did not impress it with an interstate character so as to make its unloading a part of interstate transportation.

HOLCOMB, J., dissents.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered June 20, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

Geo. W. Korte and *Cullen, Lee & Matthews,* for appellant.

Plummer & Lavin and *H. J. Kinzel,* for respondent.

CHADWICK, J.—This action was brought by Maud Morrison, as administratrix, to recover damages suf-

[1]Reported in 175 Pac. 325.

fered by her and her two minor children through the death of the husband and father, Jean Morrison.

On the 6th day of September, 1916, Jean Morrison was a foreman in charge of a building and bridge gang of the appellant. His division extended from St. Maries, Idaho, to Malden, Washington. Morrison was an experienced man in his employment. A part of the equipment of the bridge gang was a gasoline car. The day before the accident, Morrison had repaired the brake-blocks by nailing a strip of iron along the face. He went to Spokane in the afternoon and returned at noon the next day, meeting up with his gang at about noon. During his absence one Weller was in charge. He took the car out of Plummer in the morning. The crew were accustomed to ride on it to and from their work. The brake-blocks dragged the wheels, and the car had great difficulty in making the grade, which is fairly heavy at that point. Weller took it upon himself to remove the iron shoes. Morrison arrived at Mowry, where the gang were employed, about noon and took charge of his crew. The gang were engaged in unloading concrete tiling to be used in replacing wooden culverts. The tiling had been shipped from Spokane on five cars and had landed at Mowry, which is a blind siding west of Plummer Junction, three days before. At about 5:30 p. m., Morrison went to a telephone booth, which is maintained for the convenience of appellant's employees, and called the agent at Plummer. The agent details the conversation:

"Q. Tell the jury what Morrison said to you when he called you on the phone. A. When he rang and I answered, he said: 'Hello, Frank.' I said: 'Hello, Jean.' He said: 'How is second 63?' I said: 'They are at Peedee. I was just talking to the conductor and they will be at Plummer or out here just ahead or behind 27.' He said: 'All right, Frank, I am coming

down the mountain.' That is all that was said, and he hung up."

First 63 is a regular freight west bound, and second 63 is probably a second section of the same train. We do not remember that the record makes this clear. First 63 was due at Plummer Junction at 10:34 a. m., and at Mowry at 11:25 a. m. While the men were eating their dinner, a west bound freight passed. It carried white flags to indicate that it was an irregular train. It is the theory of counsel for appellant that Morrison negligently assumed that this train was first 63, having passed Mowry at about the time first 63 would be expected to pass, and it was for this reason that he asked for the whereabouts of second 63, which he would have reason to believe would follow the first of that number.

One or more of the witnesses say that Morrison said, just before going to the telephone, that he was going to get a line up, which means information as to the movement of trains. The witnesses say that, when he returned, "He said we had clear sailing to Plummer Junction." The men got on the car with Weller at the lever. Morrison and three others were riding on the front end of the car. They had gone about a mile and a half when they came upon a freight train about 300 feet away and coming down the hill. All of the men got off the car, Weller being the last to leave it, but Morrison, who was standing up crying, "Stop it, stop it," was killed by the passing train.

Negligence is alleged in two counts. First, that appellant was negligent in that it gave, through the agent, wrong information as to the location of the train which collided with and killed Morrison; and second, that the brake-shoes on the gas-car had, without his knowledge, been tampered with by one of his men and so changed that their brakeage power was insufficient to stop the car and avoid the collision after the train was sighted.

Aside from the question of negligence, the main contention of the appellant is that the deceased was not "employed in interstate commerce" as the term has been defined and applied by the supreme court of the United States when considering the Federal employers' liability act (Act April 22, 1908, ch. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]).

Counsel for both sides assume to cite apt authority to sustain their respective contentions and quarrel violently as to what the supreme court has held under the act. Counsel for appellant insists that the later opinions of the court indicate a recession from the holdings of some of the earlier cases, notably *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, Ann. Cas. 1914C 153, upon which respondent confidently relies; while opposing counsel insists, with an equal show of authority, that the court has not questioned, but has rather reaffirmed, the *Pedersen* case, and proves his position by reference to later decisions of the court which cite the *Pedersen* case as authority. It would lead to no result worth while to review the several opinions of the supreme court with a view to judicially declaring our opinion of the attitude of the court toward the *Pedersen* case. All of the decisions of that court are learned discussions when read in the light of the facts of the case at hand, but they are not always helpful as authority. They are, in some respects, seemingly contradictory. It could hardly be otherwise, for the employer being engaged in interstate commerce and intrastate commerce at one and the same time, it would seem to be impossible to lay down a general rule which would govern in every case. To quote from a writer in the Docket, Vol. 2, No. 39, April 1918:

"The chief difficulty, perhaps that is usually met with in the attempt to solve the question, is due to the

fact that practically all railroad tracks, and a large proportion of other railroad facilities, are used in both interstate and intrastate commerce, so that the line of demarcation, the 'twilight zone,' between the two uses, is necessarily uncertain and incapable of being reduced to a state of certainty."

However, much is made of the definition in the *Pedersen* case and repeated in several succeeding cases, "The true test always is—is the work in question a part of interstate commerce in which the carrier is engaged;" which to the writer is no definition at all. It conveys no more meaning than the letter of the act itself which permits a recovery if the one injured is at the time "employed in interstate commerce." The question, "What is interstate commerce?" is still open, for, as said in the same case, "In order to clothe an employee's employment with an interstate character, it must be shown that the work that he is performing had some direct relation and immediate connection with the interstate commerce of the employer."

We find ourselves unable to harmonize the decisions of the supreme court upon the Federal employers' liability act. It is patent, however, that the law is intended to be applied in spirit rather than by letter. It is useless to attempt an accurate definition of an act, or series of acts, which will bring a case within, or place it without, the provisions of the statute. As it seems to us, the dominant thought underlying the question of whether in a given case an employee was or was not engaged in interstate commerce is this: Would the performance of the act in which the employee was engaged directly and immediately tend to facilitate the movement of interstate commerce, or conversely, would the failure to perform the act directly and immediately interfere with or hinder the movement of such commerce? In applying this test the three essential fac-

tors to be considered are time, place and intent. That is to say, was the act which the employee was performing, in point of time, place and intent, so directly connected with interstate commerce as to constitute an integral part of interstate transportation. If it was, the employee is entitled to the protection of the act. If not, he is not. This brings us, as in all cases brought under the act, to the facts of the instant case. The work being done and its relation and connection with the interstate commerce of the employer, or its lack of such relation and connection, must be found in the record. We shall quote all of it that pertains to the subject. We have italicized the more pertinent parts. The head carpenter testified:

"Direct: Q. And state whether or not you had charge of the providing of the materials for the use of this gang in keeping up this roadbed as I have described? A. Yes, sir. Q. Do you recall the work that was being done on the 6th of September last at Mowry by Mr. Morrison and his gang with reference to unloading some concrete pipe? A. Yes, sir. Q. State whether or not that concrete pipe was company property for repairs, to use as repairs? A. *That was company property and not to be used as repairs, it was to be used as renewals.* Q. Was for what purpose as renewals? A. *Renewal of culverts, when the old culverts live their life out.* Q. In other words, it was company material? A. Yes, sir, company property. Q. *Yes, to be applied to the roadbed whenever needed to be applied?* A. *Yes, whenever proper.* Q. Where did that come from? A. I think it came from Massy & Company of Spokane, and was ordered through them. Q. Was shipped from Spokane to Mowry? A. As I remember, it was, yes, sir. Q. This unloading was done shortly after it arrived there, was it? A. Yes, sir, a very short time."

"Cross: Q. And there were five cars spotted on this siding for unloading at that point two or three days before they were unloaded? A. Yes, sir. Q. They

had remained there at that point with these loads on for that purpose, and the purpose of your unloading this tiling at those points was to store them for future use in connection with the railroad at some point? A. Yes, sir. Q. *The tiling has not yet been used?* A. *It has not.* Q. It is there to this day? A. There now. Q. All the tiling that was unloaded under the superintendence of Mr. Morrison? A. Yes, sir. Q. The tiling that was unloaded on the day that Mr. Morrison was hurt and was superintended by him have not been devoted to any use whatsoever in connection with the railroad at this time? A. They have not."

An employee testified:

"Q. Where were those [tiles] placed that you speak of at Sorrento and Mowry? A. Under the culvert, to put under the track there for the water to run through. Q. Had you put in like culverts from time to time? Mr. Korte: I object as immaterial. The Court: Overruled. Q. Had you put in like culverts of like materials from time to time before that? A. We put in like it, yes, sir, not at that place, though. Q. No, but at different places on the line, like material? A. Yes, sir, put in wood. Q. No, I say like material, material of the same character as this same kind of piping? A. Yes, sir, we had. Q. What was the purpose of putting that in, if you know, on the roadbed? A. Why for the water to run through. Q. You mean water running under the track? A. Yes, sir. Q. Was that the custom, to use it where it was unloaded or in that close vicinity? A. In that close vicinity, yes, sir."

Another employee testified:

"Q. During that time you worked in the same gang, I presume? A. Yes, sir. Q. What you call the bridge gang? A. Bridge and building crew. Q. All right. And along that same division? A. Yes, sir. Q. Extending from Malden to St. Maries? A. Yes, sir. Q. And engaged in the same class of work keeping up the roadbed? A. Yes, sir. Q. What kind of work were you doing? A. At what particular time, please? Q. Any place along there between Malden and St. Maries when they had this car in use. A. Repairing bridges.

Q. Repairing bridges? A. Yes, sir. Q. And putting in culverts? A. Yes, sir. Q. Concrete culverts? A. Yes, sir. Q. How long a time did that extend that you had this car with you, doing that kind of work? A. Well, during all that time I was under Mr. Morrison as a workman."

We had gathered the impression from respondent's brief and argument that the company was engaged in the carrying out of a definite program for the renewal of all wooden culverts with the concrete tiling, in which event we would incline to the belief that the act might fall within the benefit of the employers' liability act. But we hardly think the record when taken as a whole will bear out this assumption. If it were true, it would have been a matter of easy proof. Since negligence is not to be presumed but is to be evidenced by competent proofs—whether direct or circumstantial—we would not be warranted in presuming a fact in order to bring the thing done within the provisions of the act.

The unloading of the concrete tiles did not tend to facilitate interstate commerce, or, conversely, directly or immediately interfere with or hinder the movement of such commerce. It was work incident to the repair and upkeep of the road. It possessed the element, ultimate intent, but it lacked the other essentials, time and place. The record would not sustain a holding that the tiling or any other considerable part of it was to be used immediately or within a reasonable time. It was to be used as needed for replacements, and was being stored for such future use; the place of its use being uncertain and the time when it might be used being indefinite, it had lost, if it ever possessed it, the character of interstate commerce.

Although failing to harmonize the opinions of the supreme court, it does not follow that we cannot make profitable reference to them.

"The question, then, being one chiefly of fact, it follows that to a certain large extent the decision in each case will depend primarily upon the facts in that particular case; but much light may be thrown upon those facts, frequently, by careful consideration of what has been adjudicated by the higher federal courts in decided cases in which substantially similar facts have been involved." The Docket, Vol. 2, No. 39, April 1918.

Keeping in mind, therefore, that it is not every employee of a railroad doing an interstate business (this is the reef upon which the first employers' liability act was wrecked, *Employers' Liability Cases,* 207 U. S. 463), but only such as are directly and immediately connected with interstate commerce, let us look at the cases.

If deceased had been injured while putting tiling in place of the wooden culverts, or in going to or returning therefrom, the case would probably fall within the rule of *Horton v. Oregon-Washington R. & Nav. Co.,* 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8, but the storing for future use, with no showing except by barest inference that the material was to be used except as needed for replacements, takes the case out of interstate employment. The distinction, after reference made to state and Federal authority, is markedly pointed out in *Killes v. Great Northern R. Co.,* 93 Wash. 416, 161 Pac. 69. The court said:

"In *Horton v. Oregon-Washington R. & Nav. Co.,* 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8, we reviewed the cases then reported to determine a practical test to apply to cases that would fall within the act, and reached the conclusion that the employment of the injured servant must be in connection with some instrumentality used in interstate commerce, and that the relation of the employment to the interstate commerce must be such that an injury to the servant tended to hinder or delay the movement of trains engaged in such commerce. We sustained the action as within the

act in that case upon the theory that an employee whose duty it was to attend a pumping plant furnishing necessary water to interstate trains was employed in furthering the movement of interstate traffic as much as the fireman who stoked the engine, the switchman moving oil for use in an interstate engine, or the servant who repaired the engine or cars; and that in going to his employment by the means supplied by the master, he was under the protection of the act to the same extent as the fireman passing from one phase of his employment to another, in each of which cases the action has been sustained."

The intended use of material is not a certain test, and although the tiling may have been thereafter actually placed in the roadbed, it would not follow that the act of unloading was directly or immediately connected with interstate business.

In *New York Central & H. R. R. Co. v. Carr,* 238 U. S. 260, the court took occasion to say, while distinguishing the case of *Illinois Cent. R. Co. v. Behrens,* 233 U. S. 473, Ann. Cas. 1914C 163 (two cars were being moved between two points in the same state when the plaintiff was injured): "The fact that they might soon thereafter be used in interstate commerce did not affect their intrastate status." In *Chicago, B. & Q. R. Co. v. Harrington,* 241 U. S. 177, the employee had been engaged in switching certain coal belonging to the company from a storage track to a coal shed. After the coal had been put in the shed it was supplied to all locomotives as needed, and without reference to their character as interstate or intrastate instrumentalities. The only ground for invoking the liability act was that some of the coal thus stored would eventually be used as fuel by locomotives in interstate hauls. It was held that it was not material that deceased had been engaged in interstate commerce or that he might be so engaged thereafter.

"As we have pointed out, the Federal act speaks of interstate commerce in a practical sense suited to the occasion and 'the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it.' *Shanks v. Del., Lack. & West. R. R.*, 239 U. S. 556, 558, and cases there cited. Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use."

The coal had been on cars on storage tracks for a week or more—here the tiling had been on the track three or four days. Now substitute tiling for coal and we have a case almost identical with the case at bar. Instead of putting the tiling in a chute or warehouse it was stored on the ground, which, as the court says: "Was nothing more than the putting of the coal [tiling] supply in a convenient place from which it could be taken as required for use."

See, also, *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439; *Lehigh Valley R. Co. v. Barlow*, 244 U. S. 183; *New York Cent. R. Co. v. White*, 243 U. S. 188, Ann. Cas. 1917D 629, L. R. A. 1917D 1; *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, Ann. Cas. 1918B 54; *Salmon v. Southern R. Co.*, 133 Tenn. 223, 180 S. W. 165; *Hudson & M. R. Co. v. Iorio*, 239 Fed. 855; *Cincinnati, N. O. & T. P. R. Co. v. Hansford*, 173 Ky. 126, 190 S. W. 690.

The reader will note the testimony quoted in the *Hansford* case and compare it with that quoted by us. The facts make the cases identical. The *Iorio* case is valuable in that it points clearly to the obvious distinction between the *Pedersen* case and the cases cited above:

"There is plainly a difference between the actual or imminent employment of the bolts in repairing the bridge, as in the *Pedersen* case, and the mining of coal wherewith to run interstate locomotives, as in *Yurkonis* case. Whether such difference entails a distinction is a matter upon which opinions might conflict, as the dissent in supreme court decisions under this statute clearly shows. But by the latest pronouncement of that court in *Minneapolis etc. Co. v. Winters,* 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed.—January 8, 1917, it is in effect declared that when one claims the benefit of the act here invoked, because of the character or employment of the thing upon which he was working at the time of the injury, then the character of that thing 'as an instrument of commerce depended on its employment at the time (of injury), not upon remote probabilities, or upon accidental later events."

In *Missouri, K. & T. R. Co. v. Watson* (Tex. Civ. App.), 195 S. W. 1177, the workman, a section-hand, was engaged in picking up ties that had been thrown on the right of way on the same day and stacking them near a tool-house for use, at which time they would be loaded on a push-car and transported to a place where they would be used in the repair of the track. It was "concluded that the proof does not show that appellee was injured while engaged in interstate commerce."

The case of respondent is fairly put by counsel. They say:

"The mere expectation or probability that the concrete pipe would be used, when being built or constructed, in maintenance of defendant's roadbed, would not be sufficient, of course, but again we say the evidence in this case shows to any reasonable mind that the concrete tiling was bought, transported and was being unloaded as a part and parcel of the acts and things necessary to be done in carrying on the work of upkeep and maintenance of this railroad."

But the fault of this argument is that it leaves the fact upon which the legal conclusion must rest to in-

ference and puts the burden of proof on appellant, whereas the fact, if it were a fact, was capable of actual proof, at least to the extent of making a *prima facie* case. We note that counsel contends that one of the men employed testified that the tiling was to be used, as of course it was to be used, in the vicinity, and that tiling had theretofore been put in that vicinity; but, as we have said, the mere storing of supplies to make repairs or replacements when needed is not enough, for the employment lacks the element of time or reasonable time, which is the sustaining thought in the *Pedersen* case.

As a reason notwithstanding for supporting the judgment, counsel says that the tiling, having been shipped from Spokane, Washington, to Mowry, Idaho, was impressed with an interstate character, and being unloaded "a very short time after its arrival," it had not lost its character, and that the unloading was part of the interstate transportation. But if it be granted that supplies and materials bought by and transported by a carrier are indeed commodities and objects of interstate commerce within the meaning of the liability act, the contention is met by the court, upon which we must rely for our guidance, in the *Harrington* case, where the shipment had originated in Missouri and the accident occurred in Kansas. "With the movement of the coal to the storage tracks," says the court, "we are not concerned; that movement had long since ended." The cars had been on the storage tracks for a week or more. But we attach no particular importance to the reference to time. If the movement had ended and the thing transported were left ready for other movement by other hands, the element of lapsing time could not affect the rule one way or the other. So in *Pierson v. New York, S. & W. R. Co.*, 83 N. J. L. 661,

85 Atl. 233, new rails had been shipped from Buffalo, New York, to a station in the state of New Jersey, where they stood on the tracks for three or four days. They were then hauled to the place where they were to be put in place. The injury occurred in this movement. While we would doubt this case upon its main features (the decision upon which it rests was overruled, *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, Ann. Cas. 1914C 153), the court's reference to the question now presented seems to us to be consistent with the *Harrington* and the *Yurkonis* cases. It is:

"The transportation of the rails from Buffalo to Beaver Lake was interstate commerce, at least until they were turned over to the defendant *en route* for further carriage; but when they reached their destination at Beaver Lake they ceased to be an object of such commerce. In afterward transporting them from Beaver Lake to the point where they were to be used in replacement of the old rails the defendant company was not engaged in commerce at all, we think—certainly not in interstate commerce."

In *Lehigh Valley R. Co. v. Barlow*, 244 U. S. 183, it is mentioned in the syllabus that the cars, which had been hauled from the state of Pennsylvania to New York, had stood on the tracks seventeen days, but the writer of the opinion seems to attach no importance to the element of time. The case turns rather upon the holding that, "while removing them, the switching crew was not employed in interstate commerce."

It follows that plaintiff's case does not fall under the protecting influence of the Federal act, and that the action cannot be maintained.

Reversed, with instructions to dismiss.

MAIN, C. J., FULLERTON, MOUNT, PARKER, MACKINTOSH, MITCHELL, and TOLMAN, JJ., concur.

HOLCOMB, J. (dissenting)—I dissent. It is apparent to me that the handling of materials necessary to be used for the permanent maintenance of an interstate commerce railroad, as was the case here, by the employees regularly engaged in that work, was an act of interstate commerce, or in furtherance thereof, and therefore assuredly controlled by the Federal employers' liability act and the *Pedersen* case.

[No. 14561. Department One. October 8, 1918.]

AUGUST SCHULZE, *Appellant*, v. JONES & RIDDELL *et al.*, *Respondents*, BUCKEYE LUMBER COMPANY, *Defendant*.[1]

ATTORNEY AND CLIENT — COMPENSATION — CONTRACT — EVIDENCE — SUFFICIENCY. The signing and returning of a complaint to commence suit sufficiently shows acceptance of an offer to take the case on the contingent fee proposed by the attorneys.

Appeal from an order of the superior court for King county, Ronald, J., entered May 19, 1917, establishing an attorney's lien for services, after a hearing before the court. Affirmed.

Roche & Onstine, for appellant.

Jones & Riddell and *R. C. Hazen*, for respondents.

PARKER, J.—This is a proceeding to enforce a claim of lien, filed by Jones & Riddell and R. C. Hazen, against a judgment rendered in favor of August Schulze and against the Buckeye Lumber Company, the claim being for services rendered by them as attorneys of record for Schulze in the action. The issues were made up by the attorneys' claim of lien and the objections of Schulze thereto, filed in the main action,

[1]Reported in 175 Pac. 311.

which were treated as the pleadings in the controversy. The matter was submitted to the superior court upon the merits, as provided by Rem. Code, § 138, resulting in a final order establishing the lien as claimed. From this disposition of the matter, Schulze has appealed to this court.

The controversy is over the amount of compensation to be received by the respondents for their services rendered in the action, and as to what the contract between the parties was in that particular, it being conceded that there was a contract from which the amount of respondents' compensation is determinable by computation, judgment having been rendered as the result of respondents' efforts and the amount thereof paid into court by the Buckeye Lumber Company, the judgment debtor. The judgment was affirmed by this court upon appeal. *Schulze v. Buckeye Lumber Co.*, 94 Wash. 520, 162 Pac. 588. The contract is evidenced by letters of the parties, each to the other, and we think also by the conduct of appellant.

The controlling facts may be summarized as follows: In the summer of 1914, appellant placed in the hands of respondents, as his attorneys, his claim of several thousand dollars against the Buckeye Lumber Company. It becoming apparent that no satisfactory settlement could be made with the lumber company, the matter of suing that company upon the claim, and the expense of such an action, including attorneys' fees, began to be considered by appellant and respondents. On October 1, 1914, respondents wrote to appellant as follows:

"In your former letter you asked to be advised what my fee would be for services in this matter. I will take it for a flat fee of $500, or I will take a fee of $100, win or lose, and 30 per cent of the amount recovered (less the $100 already paid as a contingent

fee). I will, of course, expect you to pay the costs in any event. They will probably run about $100 so far as I can see now."

On October 5th, appellant answered as follows:

"As I am not in good circumstances at present I can only promise to pay you of the money collected from the Buckeye Lumber Company. As we are strangers I have had Mr. Folsom to write you which I enclose."

The letter from Folsom, which was inclosed, was as follows:

"It would be very difficult for him (Schulze) to spare any money as a retainer. He is entirely honest and you can depend on any arrangement you may make with him, but I believe he intends to ask you to take the prospective litigation on a contingent basis without any payment as a retainer. He seems to feel that a letter from me might help him to convince you that his desire to make an arrangement with you wholly contingent is not because he lacks faith in a lawsuit, but because he has not enough money to pay either a flat fee or a retainer in connection with a contingent arrangement."

On October 10th, respondents answered these letters as follows:

"In regard to the fee, if you do not feel able to pay any fee at the present time, I will take the case on a straight contingent fee of 50 per cent of the amount recovered. I shall, of course, expect you to pay the costs."

On October 13th, the appellant wrote to respondents as follows:

"Your letter of October 10th received. Regarding your fee, it seems to me certain for us to get a judgment in our favor. I would prefer to give you a note for $100 on your 30 per cent proposition, all to be taken out of the collection."

And on October 23d, respondents answered appellant as follows:

"In regard to fees, under present conditions I should not care to consider the note proposition, and think we had better go back to a straight 50 per cent contingent fee. Please send me your check for $25 to cover initial costs."

These letters of respondents, it will be noticed, are in the first person. This evidently is accounted for by the fact that they were written by one of them, but manifestly in the interest of all. Thereafter respondents prepared and sent to appellant a complaint looking to a commencement of the action, which complaint, after being signed and sworn to by appellant, was returned to respondents on November 13th, and thereupon the action was commenced by respondents. Thereafter some correspondence passed between appellant and respondents looking to the agreeing upon the compensation to be $100 retainer and thirty per cent of the amount of the recovery; in other words, looking to a change of the contract evidenced by the letters and the signing and verifying of the complaint by appellant and sending it to respondents to commence the action. This $100 retainer and thirty per cent proposition, however, manifestly was conditioned upon the appellant actually paying the $100 retainer in cash within a specified time, long before the trial of the action, which was never done.

It seems plain to us that the minds of the parties met upon the straight fifty per cent basis. This, we think, is rendered plain by the correspondence prior to the signing and verifying of the complaint, and by appellant's sending the complaint, signed and verified, to respondents. All that was said in the correspondence thereafter was, to our minds, only looking to a change of the original agreement of the parties, which

change, we think, clearly was never brought about. Counsel for appellant argue that his statement in the letter of October 13th, that he preferred to give a note for $100 on the thirty per cent proposition, negatives the acceptance by him of the fifty per cent proposition. It may be conceded that this does suggest that he preferred that proposition to the fifty per cent proposition. But the trouble is, that proposition was never accepted by respondents. And we think appellant's action in thereafter signing and verifying the complaint and sending it to respondents in effect authorized them to commence the action, and was an acceptance of the fifty per cent proposition. As was said by Justice Holmes, speaking for the supreme court of Massachusetts, in *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194, 33 N. E. 495:

"The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party—a principle sometimes lost sight of in the cases."

It seems quite clear to us that the order establishing the lien claimed by respondents must be affirmed. It is so ordered.

MAIN, C. J., FULLERTON, TOLMAN, and MITCHELL, JJ., concur.

[No. 14754. Department One. October 8, 1918.]

JAMES BOE, *Appellant*, v. HODGSON GRAHAM COMPANY, *Respondent*.[1]

SHIPPING—LOSS OF VESSEL—POSSESSION AND CONTROL—LIABILITY—BURDEN OF PROOF. The owner cannot recover from the charterer for the loss of a launch loaded beyond capacity through the negligence of a master furnished by, and in full charge for, the owner; and the rule casting the burden of proof upon the charterer in case of loss does not apply, since his possession was not exclusive.

Appeal from a judgment of the superior court for San Juan county, Brawley, J., entered October 4, 1916, upon findings in favor of the defendant, in an action for damages, tried to the court. Affirmed.

J. W. Bryan, for appellant.

Frank P. Christensen, for respondent.

TOLMAN, J.—This action was brought by the appellant to recover the value of the gasoline launch "Try," of which he alleges he was the owner, and which he rented or chartered to the respondent in August, 1916, by oral agreement, to be used in purchasing and transporting fish from the boats or places where purchased to the cannery of the respondent.

It is agreed that the appellant's brother-in-law, one Erickson, who had operated the boat from the time it was built in 1912, was to accompany the boat in respondent's service, and that the $5 per diem charge agreed upon covered the use of the boat and the wages of Erickson. But there is a very sharp conflict in the testimony and conclusions of the respective parties as to who should have charge and direction of the boat and be responsible for her safety; the appellant contending that the fish buyer in the employ of the respondent, one Friend, had sole charge and direction of

[1]Reported in 175 Pac. 310.

the boat and was in effect her master; while the respondent contends that Erickson was in fact the master of the boat at all times, and while Friend might, and did, direct when and to what points the boat should go, that the operation, handling, and to what extent the boat should be loaded, was left wholly to Erickson's judgment as the master. On August 19, 1916, while operating under the agreement referred to, and after taking on a load of fish and starting for the cannery upon a perfectly smooth sea, the boat sank.

Trial was had to the court without a jury, resulting in findings and judgment in favor of the respondent, from which this appeal is taken.

The appellant contends that the respondent was a bailee in sole charge of the boat at the time of her loss, and that, therefore, the burden of proof is upon it to show that the boat was lost without fault or negligence on its part, and failing in such proof, he, appellant, is entitled to recover. The dispute, in the final analysis, is therefore one of fact as to who was actually in charge of the boat, and who had the right and duty of looking after her safety, limiting her load, and directing her operations. The boat was not of sufficient size to come within the Federal registration law or to require a licensed master, and we must look to the evidence in the case to determine who was in fact her master. We think the evidence fairly establishes that the respondent employed the boat with Erickson, who had been her master at all times theretofore, placed Friend on board as a fish buyer only, with authority to direct when and where the boat should go in pursuit of the business in which he was employed, but that Erickson, who was fully advised as to her capacity and characteristics, was left free to operate her as he thought proper under these general directions. If the boat sank by reason of overloading, which seems probable,

we think the fault lay with Erickson, the master and the representative of the owner; for, though he makes some rather uncertain statements as to having protested at the amount of the load, yet he does not deny that Friend asked him if they could safely take on another hundred fish, and he tacitly consented thereto and, after the loading was completed, he put the boat in motion without any protest as to the amount of the load, and started out to sea without examination to see how much freeboard he had, without insisting upon the hatches being fastened down to prevent water which might come over the stern from pouring into the hold, and, in fact, without taking any precautions which a master should take to secure the safety of his boat. Friend knew no more about the capacity of the boat than could be learned by casual observation, while Erickson, who had operated her from the day she was built, must have known her capacity and her tendency to sink at the stern when in motion with a heavy load, if any one did. The possession of respondent not being exclusive, the rule as to the burden of proof, for which the appellant contends, does not apply. 6 C. J. 1158; *Bertig v. Norman,* 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913D 943; *North Atlantic Dredging Co. v. McAllister Steamboat Co.,* 202 Fed. 181.

A careful examination of the statement of facts convinces us that the evidence fully justifies the findings of the trial court that the boat foundered and sank while in charge of the man furnished by the appellant. This being so, it is unnecessary to discuss the law further than to say that, under all of the authorities, no cause of action exists in favor of the appellant or against the respondent.

Judgment affirmed.

MAIN, C. J., FULLERTON, MITCHELL, and PARKER, JJ., concur.

[No. 14564. Department One. October 8, 1918.]

PERCY C. SHANSTROM, *Respondent*, v. C. R. CASE, *Superintendent of Streets in the City of Seattle, et al., Appellants.*[1]

MUNICIPAL CORPORATIONS — PUBLIC WORKS — OPERATING ASPHALT PLANT—FIXING PRICE. The city of Seattle cannot legally sell the product of its asphalt plant without an ordinance fixing the price at which it can be sold, in view of Seattle Charter, art. 4, § 18, subd. 12a, which provides that the city may "by ordinance and not otherwise" operate asphalt plants and fix the price at which such materials may be sold.

MUNICIPAL CORPORATIONS—TAXPAYER'S ACTION—INJUNCTION— ILLEGAL SALE OF ASPHALT. A taxpayer being presumptively damaged by the unlawful expenditure of public moneys, may maintain an action to enjoin the city from illegally selling the product of its asphalt plant without an ordinance fixing the price at which it may be sold.

APPEAL—REVIEW—PARTIES ENTITLED. Errors cannot be urged by respondents without taking a cross-appeal.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered November 17, 1917, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action for an injunction. Affirmed.

Hugh M. Caldwell, George A. Meagher, and *Hugh R. Fullerton,* for appellants.

Roberts, Wilson & Skeel, for respondent.

TOLMAN, J.—The respondent, who is a resident taxpayer of the city of Seattle, seeks in this action to enjoin the city of Seattle and its superintendent of streets from selling asphalt manufactured at its municipal plant, and from entering into any contract for such sale, until the city has, by ordinance, fixed the price at which such product may be sold.

[1]Reported in 175 Pac. 323.

It is alleged in the complaint that the city of Seattle is the owner of an asphalt plant erected at public expense from funds raised by general taxation, and that the plant was constructed for the purpose of equalizing prices of certain paving materials and with a view of preventing exorbitant charges being made for certain character of improvements, and for the purpose of establishing and fixing a suitable price for the product manufactured at such plant. It is further alleged that, by the city charter, subd. 12a, § 18, article 4, the price may be fixed only by ordinance, that the product may be sold only at the plant at a price so fixed by ordinance, and that the tools, equipment, instrumentalities and agencies of the city may not be used for the purpose of entering into contracts or subcontracts for the paving of streets; that the city council has not passed any ordinance fixing the price at which such asphalt may be sold, and that the superintendent of streets, without legal authority, is presuming to sell such asphalt at prices fixed by him alone, and is entering into contracts for the laying of asphalt paving, in the performance of which he is using the products of such plant and the tools and implements of the city, and will continue so to do unless enjoined by the court.

The appellants demurred to the complaint on the ground that the facts alleged do not constitute a cause of action, which demurrer was by the trial court overruled, and the appellants refusing to plead further, a decree was entered granting the respondent substantially the relief prayed for, from which decree this appeal is prosecuted.

Can the city of Seattle legally sell the product of its asphalt plant without an ordinance fixing the price at which it shall be sold? It is alleged by the respondent and admitted by the appellants, "that said plant

was so built and constructed by the city of Seattle for the purpose of equalizing prices of paving materials and with a view of preventing exorbitant charges being made for certain character of improvements."

The authority to construct and operate such plant is found in Rem. Code, § 8005, which provides that any incorporated city or town within the state is authorized to

"maintain and operate works, plants and facilities for the preparation and manufacture of all such stone or asphalt products or compositions or other materials which may be used in street construction or maintenance, together with the right to use the same, and also to fix the price of and to sell the same for use in the construction of municipal improvements of such city or town;"

But the statute is silent upon the question of how the city shall fix the price for the materials sold for use in the construction of municipal improvements of such city or town. It is manifest, if the plant is constructed and operated for the purpose of equalizing prices and preventing exorbitant charges, that the price at which the city proposes to sell should be known to all persons interested at all times, so that all prospective bidders upon public work may know at what price they may procure such product in the event of securing a contract.

We are not greatly impressed by the argument that the superintendent of streets could offer to sell to one bidder at one price and demand a different and higher price, or refuse to sell at all, to another bidder, because we cannot conceive of a public official who would so lose sight of his duty. Such a possibility, however, would seem to exist if the contentions of the appellants are to obtain.

The legislature having authorized the city to fix the price and having left the manner of doing so to the

city, we must turn to the city charter to ascertain if it provides a method therefor. Section 18 of article 4 of the city charter of Seattle reads:

"Sec. 18. Powers of Council: The city council shall have power by ordinance and not otherwise— . . .

"Twelfth (a) To provide by ordinance for acquiring, opening and operating stone quarries, either within or without the city limits, and for the erection of asphalt plants and the preparation, manufacture and sale of all such stone or asphalt products or compositions or other materials which may be used in street construction or maintenance, and to fix the price at which such materials shall be sold."

This provision appears to cover the question in dispute fully and in language too clear to require construction. By the provision "by ordinance and not otherwise" the city is required and directed to fix the price at which asphalt shall be sold by ordinance, and forbidden to fix it in any other manner. If this provision be permissive only and not mandatory, as appellants contend, then it is difficult to understand why an ordinance should be required for any of the purposes mentioned in the forty odd subdivisions of the section of the charter referred to; and the mayor, or some other city official, might assume to provide for the appointment and election of officers, the assessment and levying of taxes, the acquisition of property, the borrowing of money and issuance of bonds, and the performance of other like functions, which § 18 provides shall be done by ordinance only.

The argument that the price must necessarily change from time to time because of a change in the cost of production cannot, in our judgment, prevail against the plain language of the charter.

No doubt the city may use its asphalt, under the authority of the statute heretofore quoted, to improve and repair streets, and when it carries on the work

of local improvements by days' labor. But our attention has not been called to any provision of law, statutory or charter, which authorizes the city to enter into contracts or subcontracts for the laying of asphalt, and we know of no authority for a municipality to hazard public funds gathered by taxation by entering into competition with private enterprises in the taking of contracts or subcontracts for the laying of asphalt even upon its own streets.

Some contention is made here as to the right of the respondent to maintain this action. But under *Dirks v. Collin,* 37 Wash. 620, 79 Pac. 1112, and *Miller v. Sullivan,* 32 Wash. 115, 72 Pac. 1022, we think the action was properly brought by the respondent.

Counsel for the respondent invites our attention to paragraph nine of the complaint, which alleges that the city charter provides that all local improvement work must be done under the direction and supervision of the city engineer; that, notwithstanding these provisions, the superintendent of streets has assumed to do, and has done, work in the nature of street paving, and private contracts for paving of streets, without the supervision of the city engineer. In the decree entered by the trial court, the city and its superintendent of streets is enjoined from selling asphalt until the price shall have been fixed by ordinance, and from undertaking to perform private contracts in the nature of subcontracts for contractors who have been awarded contracts for public improvements, and from doing and performing any paving or local improvement work without the same is done in accordance with the city charter and the ordinances of the city of Seattle. If this last provision means that the work must be done under the supervision of the city engineer as provided by the charter, then it has our approval, but if it means that the superintendent of streets may continue to per-

form work without the supervision and approval of the city engineer, we are powerless, in the absence of an appeal by the respondent, to pass upon the question he thus raises.

Finding no error, the judgment of the trial court will be affirmed.

MAIN, C. J., FULLERTON, PARKER, and MITCHELL, JJ., concur.

[No. 14572. Department One. October 8, 1918.]

R. P. WOODWORTH, *Appellant*, v. SCHOOL DISTRICT No. 2, STEVENS COUNTY, *Respondent*.

R. P. WOODWORTH, *Appellant*, v. UNION HIGH SCHOOL DISTRICT No. 3, STEVENS COUNTY, *Respondent*.[1]

SCHOOLS AND SCHOOL DISTRICTS—WARRANTS—ISSUANCE—REGISTRATION AND DELIVERY. The fact that school district warrants issued for supplies purchased, were not countersigned and registered by the auditor before delivery, under Rem. Code, §§ 4554, 4557-2, does not prevent their subsequent countersigning and registration before any change in the situation of the parties, who were in the same position as though new warrants had been then issued, countersigned, registered and delivered.

SAME—CLAIMS AGAINST DISTRICT—PAYMENT IN WARRANTS—BONA FIDE ASSIGNEES. School district warrants issued in payment of supplies to an agent having apparent authority to make the collection, and assigned to a *bona fide* purchaser prior to any notice of want of authority, pay the indebtedness as effectually as if the payments had been in money, and requires payment of the warrants, even after notice that the agent had no authority to receive them.

SAME—WARRANTS—TRANSFER—NEGOTIABILITY. While school district warrants issued for supplies purchased are not negotiable within the law merchant, they are negotiable in so far as the transfer of title is concerned, subject only to any defense which might have been made to the claim on which they were founded.

[1]Reported in 175 Pac. 321.

Appeals from judgments of the superior court for Stevens county, Truax, J., entered July 20, 1917, upon verdicts of a jury rendered in favor of the defendants, in consolidated actions on contract. Affirmed.

O. C. Moore, for appellant.

L. B. Donley, John B. Slater, J. A. Rochford, and *F. Leo Grinstead,* for respondents.

PARKER, J.—These cases were before this court upon appeal from prior judgments rendered against the plaintiff, Woodworth, as assignee of the Self-Winding Clock Company, which judgments were reversed and new trials awarded to the plaintiff by our decision reported in 92 Wash. 456, 159 Pac. 757, to which we now refer for a statement of the facts of the controversy. The cases were again, by agreement of the parties, tried together in the superior court for Stevens county, resulting in verdicts and judgments against the plaintiff, denying him recovery, from which he has again appealed to this court.

There is here presented, as upon the former trial and appeal, the question of the authority of Jansson, as agent for the Self-Winding Clock Company, to collect for it the amounts owing by the school districts for the installing of clocks and appliances, by the contention made in appellant's behalf that the trial court erred in refusing to sustain his counsel's motion, timely made, for judgments notwithstanding the verdicts, upon the ground that the evidence was such as to entitle him to judgments against respondents for the amounts claimed, as a matter of law. A review of this record convinces us that the facts upon which these verdicts and judgments rest are substantially the same as those upon which the former verdicts and judgments rested, except certain evidence excluded upon

the second trial in harmony with our decision rendered in reversing those judgments and awarding a new trial, and except certain evidence touching the manner of issuing the warrants to Jansson in payment of the clocks and appliances. Assuming for the present that the latter does not call for the reversal of these judgments, and that we have here for consideration only the question of Jansson's authority, as agent of the clock company, to collect from respondents the amount owing by them for the clocks and appliances, at the time he received the warrants, we feel constrained to hold, as upon the former appeal, that the jury was warranted in finding, as it did in effect, that Jansson then had such apparent authority, and therefore such real authority, in so far as the rights of the appellant here involved are concerned. We deem it unnecessary to again review that question.

It is claimed by counsel for appellant, and we assume, for argument's sake, that the issuance and delivery of the warrants to Jansson was attended by certain irregularities; from which they argue that respondents did not, in effect, pay Jansson, as agent of the clock company, until after they had notice that the clock company claimed he was not its agent for the purpose of collecting the amounts owing by them for the clocks and appliances, although at the time of the issuance of the warrants respondents may have acted in good faith in issuing and delivering the warrants to Jansson upon the theory that he was then authorized to collect the amounts owing by them for the clocks and appliances. The warrants were issued and delivered to Jansson on December 9, 1911. They were not, prior to their delivery to him, presented to the county auditor for countersigning and registration as provided by §§ 4554, 4557-2, Rem. Code, which read:

"He [county auditor] shall countersign and register warrants for the payment of all teachers' salaries, supplies, apparatus, and accounts against the districts upon the written order of the majority of the members of the school board of each district."

"He shall register in his own office, and present to the treasurer for registration in the office of the county treasurer, all warrants of the first and second-class districts received from secretaries or clerks thereof before delivery of the same to claimants."

Respondents appear to be school districts of the second class. A short time after receiving the warrants, Jansson transferred them by blank indorsement and delivery to the Bank of Colville. They were, about the same time, presented either by Jansson or the bank to the county auditor, when they were countersigned and registered by him in the manner prescribed by the law above quoted. The argument seems to be that, since this was done after delivery of the warrants to Jansson, their issuance and delivery to him were illegal and beyond cure. We think this is not so, in so far as appellant's rights here involved are concerned. Appellant is in the same position as if Jansson had caused these warrants to be surrendered to respondents and they had issued new ones and had them countersigned and registered by the county auditor and then delivered them to him, and he, in turn, had assigned them by indorsement and delivery to the bank before respondents had any notice of appellant's claim that he was not its agent for the purpose of collection. In other words, these warrants were issued by respondents, countersigned and registered by the county auditor, and delivered to Jansson and by him assigned to the bank long before respondents had any knowledge of appellant's claim that Jansson was not its agent for the purpose of collecting the amounts owing by them for the clocks and appliances.

Appellant, we think, is in no position to complain of the order in which the issuance, countersigning and registration of the warrants occurred. Plainly, neither the clock company nor appellant was in the least prejudiced by the order in which these acts occurred.

These warrants were finally paid in due course to the bank by the county treasurer from funds of respondents on April 25, 1914, which was about two months after the commencement of this action. Respondents had notice of appellant's claim that Jansson was not its agent for the purpose of collecting the amounts owing by them, at the time of the commencement of this action and for some time prior thereto, but not until long after the issuance of the warrants to Jansson, their countersigning and registration by the county auditor, and their transfer by Jansson to the bank. It is contended in appellant's behalf, in substance, that this knowledge coming to respondents before the warrants were actually paid by the county treasurer, respondents were bound to take steps looking to the prevention of the payment of the warrants, and not doing so, they, in effect, paid Jansson, by the payment of the warrants to the bank, after having notice of appellant's claim that he was not its agent for the purpose of collecting the amounts owing by them for the clocks and appliances for which the warrants were issued. This contention was, in effect, disposed of by our former decision favorably to respondents, since these facts appear in the record upon that appeal, though it seems to have received but brief notice therein. We are convinced, however, that it was rightly so disposed of. The warrants having been lawfully issued to Jansson upon the theory that respondents could then pay the indebtedness to him because of his apparent authority to collect the indebtedness, and he having transferred them to the bank, an inno-

cent holder, we think it would be inequitable to now hold that the warrants did not, in effect, pay the indebtedness to Jansson as effectually as if respondents had then paid him in money. It is true we have held that such warrants are not negotiable instruments within the meaning of the law merchant, but we have also held that such warrants do possess the qualities of negotiable instruments in so far as the manner of transfer of their title is concerned. In *Fidelity Trust Co. v. Palmer,* 22 Wash. 473, 61 Pac. 158, 59 Am. St. 953, Chief Justice Gordon, speaking for the court, said:

"The great weight of authority is that a county or city warrant possesses all of the qualities of negotiable paper but one, viz., that it is open to any defense which might have been made to the claim upon which it is founded. For all purposes involving its title, it must be treated as negotiable."

See, also, *Marcus v. Ofner, ante* p. 478, 175 Pac. 31.

This is not a question of respondents having any defense against the indebtedness for which the warrants were issued.

The jury having, in effect, found that respondents were authorized to pay the indebtedness to Jansson, as the evidence warranted, and respondents having, in payment of such indebtedness, lawfully issued to him the warrants, possessing qualities of negotiability in so far as the manner of transferring their title is concerned, and the bank having innocently acquired them, we are of the opinion that it is now too late for the clock company, or appellant, its assignee, to insist that their payment by the county treasurer was the payment of the indebtedness by respondents after they had notice of the clock company's claim of want of authority in Jansson to collect the indebtedness.

Some contention is made that the trial court erred

in refusing to give certain requested instructions. We think that the requested instructions were given by the court in substance in so far as appellant was entitled thereto.

The judgments are affirmed.

MAIN, C. J., MITCHELL, TOLMAN, and FULLERTON, JJ., concur.

[No. 14638. Department Two. October 8, 1918.]

FRED L. STEVENS, *Respondent*, v. CLARENCE SELVIDGE *et al.*, *Appellants*.[1]

TRIAL—PROVINCE OF COURT AND JURY—DIRECTING VERDICT—BILLS AND NOTES. In an action on notes, where it was shown that the plaintiff was a holder in due course, and defendants failed to introduce any evidence showing that plaintiff purchased after maturity or had notice of any defense, there was no question for the jury and the court properly directed verdict for the plaintiff.

Appeal from a judgment of the superior court for Spokane county, Sessions, J., entered November 21, 1916, in favor of the plaintiff, upon withdrawing the case from the consideration of the jury, in an action on promissory notes. Affirmed.

C. T. McDonald, for appellants.
J. Milton Collins, for respondent.

MOUNT, J.—This action was brought to recover upon two promissory notes of $100 each. The complaint is in the usual form. For answer to the complaint, the defendants admitted the execution of the notes, and for an affirmative defense, alleged, in substance, that the notes sued on were renewals of two notes which were originally given for the purchase of perfumery and jewelry; that the original notes were given, one for $150 and the other for $148, for perfumery and

[1]Reported in 175 Pac. 294.

jewelry which were to be sold by the defendants within a year, and, if not sold within that time, they were to be taken back by the holders in payment of the notes; that the perfumery and jewelry were not as represented, were not sold, and within the year were tendered back to the holders of the notes and by them refused; that thereafter another agreement was entered into by an agent of the original holders, wherein $98 worth of perfumery and jewelry was taken back and two new notes of $100 each were issued, payable upon the same terms as the original notes.

Upon the trial of the case, the plaintiff proved that he had purchased these two notes for value, one of them from the Iowa State Bank, and the other from C. W. Harrison. Thereupon the defendant Selvidge testified substantially as he has alleged in his affirmative defense: That, after the original notes were executed for $298, an agent representing the original holders of the notes demanded payment thereof, and upon that demand a settlement was made by which Mr. Selvidge had turned back $98 worth of goods and given two notes for $100 each, one to the Iowa State Bank, which had purchased one of the original notes, and the other to C. W. Harrison, who had purchased the other of the original notes; that, at that time, there was an agreement that, if the goods were not sold within a certain time, they might be taken back and the notes thereby paid. Upon this state of facts, the court concluded that the plaintiff was a holder in due course in good faith, and that there was no evidence that the plaintiff knew anything about the original transaction or the subsequent transaction, to which he was not a party, and concluded, therefore, that there was no question of fact to be submitted to the jury, discharged the jury and entered a judgment in favor of the plaintiff. The defendants have appealed.

They argue that the court erred in taking the case from the jury. We think it is plain from the evidence that the respondent is a holder in due course. 3 R. C. L., § 234, page 1037. It therefore devolved upon the appellants to show that there was an agreement to pay the notes sued upon in the manner alleged, and that the respondent purchased the notes after maturity or had notice of that agreement. No such evidence was introduced. There was plainly, therefore, no question of fact to be submitted to the jury. The court properly directed judgment in favor of the respondent. *Murray v. Bush*, 29 Wash. 662, 70 Pac. 133; *Easterly v. Mills*, 54 Wash. 356, 103 Pac. 475, 28 L. R. A. (N. S.) 952.

The judgment is therefore affirmed.

MAIN, C. J., CHADWICK, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14850. *En Banc.* October 8, 1918.]

F. C. HENNEBERG, *Respondent*, v. G. W. COOK *et al.*, *Appellants*.[1]

FRAUDS, STATUTE OF — BROKER'S COMMISSIONS — CONTRACT TO PAY FOR PAST SERVICES. A written agreement that a certain sum was due for a broker's commission in case of consummation of the sale, entered into ten days after the sale, was, in effect, an agreement to pay for past services, and so is not within Rem. Code, § 5289, which requires a broker's written contract for commissions to contain a description of the property to be sold.

PLEADING. A defense upon which the defendant refused to introduce any evidence must be considered as abandoned.

BROKERS—CONTRACT—CONSTRUCTION—TIME FOR PAYMENT. A contract for a broker's commissions payable on or before a certain date, as follows: "one-half when a certain mortgage was sold," which sale was within the control of the owner, requires payment by such date.

[1]Reported in 175 Pac. 313.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered November 15, 1917, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Losey & Newton, for appellants.

A. E. Barnes, for respondent.

HOLCOMB, J.—Respondent and appellants entered into a written contract as follows:

"This agreement, made and entered into this 23d day of March, 1912, by and between the Cook-Reynolds Co. and Lee-Wier Co., and F. C. Henneberg, to wit:

"It is agreed and understood that in case the sale of the 578 acres of land located in Fergus county, Montana, to John A. Schmidt of Spokane, Wash., is closed according to the contract entered into between the Cook-Reynolds Co. and said John A. Schmidt, March the 13th, 1912, there will be due the Lee-Wier Company and F. C. Henneberg the sum of ($1,445) fourteen hundred and forty-five dollars, payable by the Cook-Reynolds Co. on or before July 16th, 1913, as follows:

"Seven hundred and twenty-two 50-100 ($722.50) when the Cook-Reynolds Co. has sold that certain mortgage of $5,000 to be received from the said John A. Schmidt according to contract, and $722.50, seven hundred twenty-two 50-100 dollars, when the lot numbered 6 in block 8, Sinto Addition to Spokane, is sold by said Cook-Reynolds Co.

"It being understood and agreed that the Cook-Reynolds Co. shall pay one-half (½) of each of the above mentioned payments to the Lee-Wier Co., and one-half (½) of each of the above mentioned payments to F. C. Henneberg.

"It being further agreed, however, that in case the said sale of said land above mentioned is not consummated and closed according to said contract with John A. Schmidt, then in that case there will be no commission due either Lee-Wier Co. or F. C. Henneberg, and this agreement shall be null and void.

"Signed this 23d day of March, 1912, by George W. Cook, its treasurer of the Cook-Reynolds Co., and Lee-Wier Co. and F. C. Henneberg.

"Lee-Wier Co.
"By E. T. Lee, and F. C. Henneberg.
"The Cook-Reynolds Co.
"By G. W. Cook, Treasurer."

This suit was brought on the contract to recover the last half of respondent's commission of $472.75, with interest.

Respondent testified in his own behalf that the contract for the sale of the Montana land was fulfilled by sale to Schmidt, but no attempt was made to prove the description of the 578 acres of land in Fergus county, Montana, nor was evidence offered to show that the sale contract in appellants' possession contained a description of the land.

It is alleged that appellants partly performed the commission contract by paying one-half of the commission, and that they refuse to pay the last half thereof.

Appellants alleged and contended, (1) that the commission contract was void on account of the statute of frauds; and (2) that the lot taken in the trade had not been sold and, for that reason, the last installment of commission was not due. At the close of respondent's testimony, appellants moved for judgment, which was denied. Appellants refused to introduce any evidence, and judgment was granted to respondent.

Appellants assign that the court erred: (1) In refusing to sustain appellants' demurrer to the complaint; (2) in refusing to grant judgment in their favor upon motion made at the conclusion of respondent's testimony; (3) in refusing to find that the contract sued on is within the statute of frauds, and that no sufficient description of the land, for the sale of which respondent is claiming a commission, is set forth

in the contract; and (4) in refusing to find that, under the terms of the contract, there was nothing due respondent at the time suit was commenced, for the reason that the terms thereof as to the sale of the lot in Spokane had not yet been complied with.

The first three assignments may be considered together, the controlling question being whether the commission contract is controlled by the statute of frauds. Rem. Code, § 5289, is as follows:

"In the following cases specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: . . . (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

It will be seen that the contract herein for compensation or commission for the services rendered by the agent or broker to sell or purchase real estate was in writing. Respondent proved that he had completed the services and had received part of the commission. If the commission contract had contained a definite description of the property sold, respondent would have been under the same obligation to prove that he had performed the contract. Appellants cite us to *Rogers v. Lippy,* 99 Wash. 312, 169 Pac. 858, and *Nance v. Valentine,* 99 Wash. 323, 169 Pac. 862, but the case at bar can readily be distinguished from these cases in that it refers to the sale contract entered into on March 13, 1912, between appellants and Schmidt, and provides that, upon closing the contract, there will be due respondent *et al.,* $1,445, payable by appellants on or before July 16, 1913, upon specified contingencies. Thus it will be seen that a sale contract had been entered into and that, when the same was fulfilled ac-

cordingly, certain amounts were due respondent to be paid within a time certain. This contract was entered into March 23, 1912, ten days subsequent to the making of the sale contract, and was, in effect, a promise to pay for past services. *Muir v. Kane,* 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519. It was manifestly so construed by appellants when they paid the first installment due for the service. Furthermore, the statute of frauds, as amended in 1905, § 5289, *supra,* was for the purpose of preventing frauds instead of promoting the same. The rule established in the *Rogers* and *Nance* cases, supra, should not be extended to cases where the services of a broker have been completed, all the parties to the sale contract have fully performed, a written promise to pay the broker for his service has been signed by the party to be charged, and there existed no necessity for specific performance to complete the sale.

Appellants' fourth assignment of error relates to the time when the commission is payable. The second defense, that the lot taken in trade had not been sold, and for that reason the last installment—that sued on —was not due, was not supported by any evidence and must be considered abandoned when appellant refused to offer evidence in support thereof. On examining the contract, it is plain that all the commission is due on or before July 16, 1913, and the subsequent provisions must be considered to have been effectuated as long as they are within this period. The sale of the lot was within the control of appellants. If it was not sold, such fact was a matter of affirmative defense and proof on the part of the party within whose control it was, even if it can be conceded that, under the provision of the contract for payment within a certain time, the party charged therewith could indefinitely

postpone its payment by indefinitely postponing the sale of its lot.

There is no error. Affirmed.

MITCHELL, FULLERTON, MOUNT, MACKINTOSH, and TOLMAN, JJ., concur.

MAIN, C. J., and CHADWICK, J., concur in the result.

[No. 14701. Department One. October 14, 1918.]

W. H. KAUFMAN *et al.*, *Respondents*, v. J. B. McMILLAN *et al.*, *Appellants*.[1]

HIGHWAYS—ESTABLISHMENT—PETITION—SIGNERS — SUFFICIENCY—STATUTES. There is no constitutional objection against the initiation of a permanent highway improvement by a petition signed by the owners of two-thirds of the lineal feet of the lands fronting upon the highway, as authorized by Rem. Code, § 5879-2, and it is not necessary that the petition be signed by two-thirds of the owners of the property to be included within the assessment district.

SAME—ASSESSMENT—METHODS—BENEFITS—ZONE SYSTEM. An assessment of lands not shown to be in excess of the benefits received, is not *ipso facto* invalid because made by area or by a zone system, under Rem. Code, § 5879-10 fixing three zones on each side of a permanent highway improvement, and specifying the proportion each shall bear of the cost assessed to the property in the district, and providing that each tract or parcel of land in any zone shall be assessed according to the relation of the area thereof to the total area within the zone.

SAME — ASSESSMENT — BENEFITS — FAILURE TO OBJECT. Property owners who did not avail themselves of the opportunity to be heard upon the question of benefits from a permanent highway, assessed under Rem. Code, §5879-1 *et seq.*, and whose lands were not assessed in excess of benefits, cannot maintain an action to enjoin assessment upon the ground that the scope of the hearing on the assessment roll was unduly limited by the statute.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered July 16, 1917, upon findings in favor of the plaintiffs, in an action to enjoin the collection of an assessment for a permanent highway improvement, tried to the court. Reversed.

[1]Reported in 175 Pac. 309.

W. P. Brown, for appellants.

Brown, Peringer & Thomas, for respondents.

MITCHELL, J.—Respondents brought this action to have declared void, and to restrain the collection of, assessments levied against their lands for a permanent highway improvement. The trial court, upon issues framed and hearing had, granted all the relief demanded in the complaint. Defendants appeal.

The facts were stipulated and, for the purposes of this case, are as follows: A petition was presented to the board of county commissioners of Whatcom county asking that a part of what is known as the northwest diagonal road be improved by a hard surface driveway. In the petition the board of county commissioners was asked to make a district not more than three miles in width and that fifty per cent of the cost of the improvement be paid by the district, the remainder to be paid out of the permanent highway fund. The petition was signed by the owners of more than two-thirds of the lineal feet of lands, other than lands of the state or of the United States, fronting upon and touching the highway, but the petition was only signed by owners of land actually touching and bordering upon the highway. The total area of the district, three miles in width, is about 9,500 acres, and the petitioners were, and are, the owners of not more than 1,500 acres. In due time, the prayer of the petition was granted and a district three miles in width created, one and one-half miles on each side of the highway. The board of county commissioners caused the highway to be improved. After the highway was constructed, for the purpose of making assessments against the lands in the district, the district was divided longitudinally on each side of the center of the improvement into three subdivisions, each one-half a mile in width, and fifty per cent of the cost

of the improvement was apportioned to the subdivisions as follows: Seven-fifteenths to the first subdivision, five-fifteenths to the second subdivision, and three-fifteenths to the third subdivision and each parcel or tract of land situate within the district and within the respective subdivisions thereof was assessed, to determine the benefits to each parcel of land, by the county engineer according to the relation of the area thereof to the total area within the respective subdivision within which the same was situate; that is to say, the amount to be assessed against each acre of land in each subdivision was found by dividing the total cost apportioned to each subdivision by the number of acres embraced within such subdivision; and by such manner of assessment an acre of land touching and adjoining the highway was assessed the same as another acre of land in the same subdivision, no matter where it was situated. The assessments made in the other subdivisions were made in the same manner.

Prior to the establishment of the district and the making of the improvement, no meeting was had by the board of county commissioners for hearing protests against the establishment of such improvement or against the creation of the district. After the district was created, the improvement made, and the assessment returned, a notice of the meeting of the county commissioners as a board of equalization was published, as required by statute, directing all owners of property affected by such assessment to appear on a day therein specified to make their objections. A meeting of the board of equalization was held pursuant to said notice, and the assessment roll prepared by the county engineer was approved. The respondents, or either of them, did not appear at said meeting or file any protest, or make any oral protest or objections at said time to the assessments levied against their lands.

Respondents herein knew of the proposed construction and improvement of said highway prior to the inception of the work, and knew of its construction as the work progressed. Respondents are the owners of real property situated in the district, and the same was included in the assessment roll. Appellants were threatening to file said assessment roll with the county treasurer at the time of the commencement of this action.

The district was created, improvement made, and assessments levied under the provisions of § 5879-1 *et seq.*, Rem. Code, known as the permanent highway law.

Respondents find fault with the law, however, as understood by the county officers, and mark such disapproval by the following points: (1) That the petition for the improvement should have been signed by the owners of two-thirds of the lands within the district, rather than by only the owners of two-thirds of the lineal feet of the lands, other than lands of the state or of the United States, adjoining and touching upon the highway; (2) that the assessment was made arbitrarily or upon a fundamentally wrong basis, because each parcel of land in any one of the subdivisions was assessed according to the relation of its area to the total area within that subdivision, rather than ratably in proportion to the benefits to each tract within the subdivision; and (3) that, by the terms of the permanent highway law, the scope of the hearing on the assessment roll by the board of equalization is unduly limited to the ascertainment if the official making the assessment has made any clerical error in distributing the assessments according to the basis of area; thus not allowing the property owner to be heard with reference to the matter of benefits as compared with the assessment.

With respect to the whole case, it is to be noticed there is no evidence nor claim that respondents' lands are not benefited by the improvement to the extent of the assessments.

This case, although brought by different parties and landowners, involves the same public improvement and assessment district referred to in the case of *Lindstrom v. McMillan,* 98 Wash. 608, 168 Pac. 463, the opinion in which had not yet been filed at the time the record and briefs in the present case were received by the clerk of this court.

The above-mentioned propositions, one and two, made by respondents were considered by us in the case of *Lindstrom v. McMillan, supra,* and determined adversely to respondents' contentions; but because counsel have now more fully discussed them, we have been led to reexamine them, with the result that we are quite satisfied with that decision.

As to respondents' third point, it appears unnecessary to determine if their claim as to the scope of the law is correct. If it is broad enough to require or permit the property owner to present to the board of equalization the question of benefits, respondents are entitled to no relief in this action, for, confessedly, they did not avail themselves of that plan. On the other hand, if the permanent highway law does not contemplate a hearing by the board of equalization on the subject of benefits as compared with assessments, that fact affords no reason for success to respondents in this suit.

It was well said in *East Hoquiam Co. v. Hoquiam,* 90 Wash. 210, 155 Pac. 754:

"Taxation by special assessment is defensible only upon the theory of corresponding special benefits to the property assessed."

If, in any case, it is proposed by corporate authorities to assess property within an improvement district beyond the amount of special benefits to the property assessed by reason of the improvement, and the law under which such corporate authorities act contains no provision safeguarding the rights of the property owner in the respect mentioned, there is the opportunity, nevertheless, to resort to the courts for such protection and defense. As already observed, this suit presents no such issue.

The judgment is reversed, and the cause remanded with direction to the superior court to enter a judgment to the effect that respondents take nothing by the action.

MAIN, C. J., FULLERTON, PARKER, and TOLMAN, JJ., concur.

[No. 14718. Department One. October 14, 1918.]

L. F. LUNDY *et al.*, *Respondents*, v. BEND PARK COMPANY, *Appellant*.[1]

TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions which are covered in the general charge.

VENDOR AND PURCHASER—REMEDIES OF VENDEE—RECOVERY OF PURCHASE MONEY—INSTRUCTIONS. In an action to rescind a sale of real property and recover purchase money, an instruction that the written contracts contained warnings against oral representations not contained in its authorized literature are properly refused, where it appears that such literature was not generally obtainable at the time, and such as was obtainable contained the false representations.

Appeal from judgments of the superior court for King county, Smith, J., entered October 11, 1917, upon the verdicts of a jury rendered in favor of the plaintiffs, in consolidated actions for rescission. Affirmed.

[1]Reported in 175 Pac. 294.

Brightman & Tennant and *Silvain & Butler (Fred G. Clarke,* of counsel), for appellant.

Walter B. Allen, for respondents.

TOLMAN, J.—Two actions were brought in the superior court of King county (one by each of the respondents) to rescind contracts for the purchase of certain lots in Bend, Oregon, and to recover the purchase money paid thereon, which actions were consolidated and tried together to a jury. Separate verdicts were rendered and separate judgments entered thereon, one in favor of each of the respondents, and this appeal is prosecuted from both of such judgments, the causes being treated as consolidated in this court.

Both respondents began to purchase lots at about the same time, through the same agent, and allege that they were induced to do so by practically the same representations, all of which are claimed to have been false and fraudulently made.

Error is assigned upon the refusal of the trial court to grant a nonsuit at the close of respondents' case, the refusal to direct a verdict in favor of appellant, and the refusal to give certain requested instructions.

The first two and the last three assignments of error are based upon the claim that there was not sufficient evidence to go to the jury. As is usual in cases of this kind, there was considerable conflict in the testimony, which is voluminous, and because of the double issues involved, cannot be set out so as to give the reader an intelligent idea of its force and effect without unduly extending this opinion. After a careful reading of the evidence and examination of the record, we are convinced that there was sufficient evidence to carry the case to the jury upon all of the issues submitted, under the well established rules of law in this state relating

to cases of this character, and that the court did not err in that respect.

Appellant's requested instructions Nos. 3 and 4 were, so far as they were proper, fully covered by the instructions given; and those portions thereof which were intended to tell the jury that the written contracts contained warnings that appellant would not be bound by any oral representations by whomsoever made not contained in its authorized literature and that the same were binding upon respondents were properly refused because of the testimony in the case that, at the time of the purchase, but little of appellant's literature had been printed or was obtainable at its office, and that such as was obtainable did contain, in part at least, the false representations upon which respondents based their actions.

We are unable to grasp any theory of the case which would make appellant's requested instruction No. 5 proper, and can see no good purpose to be served by setting forth the requested instruction and further commenting thereon.

Having found no error, the judgments appealed from will be affirmed.

MAIN, C. J., MITCHELL, PARKER, and FULLERTON, JJ., concur.

[No. 14771. Department Two. July 9, 1918.]

GERTRUDE MAY KELLER, *Respondent*, v. LEROY S. KELLER, *Appellant*.[1]

Appeal from an order of the superior court for Snohomish county, Bell, J., entered October 24, 1917, modifying a divorce decree. Affirmed.

E. C. Dailey, for appellant.
George W. Louttit, for respondent.

PER CURIAM.—By an order modifying a decree of divorce, the respondent was given the care and custody of the three minor children of the parties to this action, and this is an appeal from that order.

An examination of the testimony, which it is not necessary to even outline, satisfies us that the trial court was correct in making the order complained of.

The order is affirmed.

[No. 14597. Department Two. July 30, 1918.]

UNITED COLLIERIES COMPANY, *Respondent*, v. GUY POSSON, *as Carbon River Coal & Coke Company, Appellant*, WINTON MOTOR CARRIAGE COMPANY, *Defendant*.[1]

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered June 29, 1917, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Blair & Blinn, for appellant.
Irving T. Cole, for respondent.

PER CURIAM.—The question in this case is whether a credit of $1,079.26 with the Winton Motor Carriage Company is the property of the respondent or rightfully belongs to the appellant, Guy Posson. The trial court, after hearing the evidence, concluded that the credit belonged to the respondent.

The question presented is simply a question of fact, depending upon the veracity of the witnesses. We are satisfied, after examining the record, that the trial court properly found in favor of the respondent.

The judgment is therefore affirmed.

MACKINTOSH, J., took no part.

[1]Reported in 173 Pac. 375.

[No. 14722. Department Two. August 1, 1918.]

In the Matter of the Estate of LOTT FILLMORE.[1]

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered July 24, 1917, refusing probate of a will, after a hearing to the court. Affirmed.

E. L. Casey, *J. G. Thomas*, and *W. A. Toner*, for appellants.
J. C. Hurspool and *W. G. Coleman*, for respondent.

MACKINTOSH, J.—By will dated January 18, 1915, the deceased devised his small estate to the respondent, his sixth wife, and by will dated December 8, 1916, the appellant, his son, was to be the recipient of his bounty. The first will was probated, and the appellant in this action seeks to have it set aside and the last will admitted to probate. The respondent, in defense, claims that the deceased was, at the time of the execution of the later will, of unsound mind and that its execution was procured by fraud and undue influence. The trial court refused to annul the probate of the first will, finding that, while the deceased was competent to make a will at the time the later will was executed, the execution thereof was procured by the use of undue influence exercised by the appellant.

We have closely examined the record and testimony, which it is not necessary to recite here, and have arrived at the same conclusion as did the conscientious trial judge, and therefore affirm his judgment.

MAIN, C. J., HOLCOMB, MOUNT, and PARKER, JJ., concur.

[1]Reported in 173 Pac. 374.

[No. 14616. Department One. August 13, 1918.]

JOHN ROBERT JUDGE, *as Administrator etc., Appellant*, v. MARIE J. LINDSAY *et al., Respondents.*[1]

Appeal from a judgment of the superior court for King county, Carroll B. Hendron, Judge *pro tempore*, entered June 22, 1917, dismissing on the merits, an action for equitable relief, tried to the court. Affirmed.

Howard H. Startzman and *John Robert Judge*, for appellant.
F. B. Churchill, for respondents.

PARKER, J.—The plaintiff, as administrator, seeks an accounting from the defendants for moneys and property which he claims they received from Harry A. Koster during his lifetime, in fraud of his rights when he was mentally incompetent, and also seeks the decreeing of certain real property as being held by them in trust for the benefit of his estate. Trial in the superior court for King county resulted in judgment denying to the plaintiff the relief prayed for, and also quieting title to the real property in controversy in those of the defendants now holding the record title thereto. From this disposition of the cause, the plaintiff has appealed to this court.

There are no questions here presented which we regard as calling for serious consideration other than questions of fact. We have, with painstaking care, reviewed this entire voluminous record, and are quite convinced that it falls little short of conclusively showing that, whatever moneys were entrusted by the deceased to the defendants, were accounted for, paid over to him, or expended in his behalf as directed by him, during his lifetime; that none of the property claimed by appellant as being held in trust by respondents was acquired by them with funds of the deceased or in fraud of his rights; and that the deceased was not mentally incompetent at any of the times he had transactions with any of the respondents touching his property rights.

Some contentions are made touching claimed errors of the trial court in ruling upon the admission of evidence upon the trial. There was in no event any prejudicial error in these rulings.

The judgment is affirmed.

MAIN, C. J., TOLMAN, MITCHELL, and FULLERTON, JJ., concur.

[1]Reported in 174 Pac. 650.

[No. 14916. Department Two. August 27, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Mrs. Emma Westman, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent.*[1]

Application filed in the supreme court July 23, 1918, for a writ of certiorari to review the action of the superior court for King county, Jurey, J., in denying the petition of the relator for release on habeas corpus. Writ denied.

W. F. Hays and *Lockerby & Wright*, for relator.

Hugh M. Caldwell, Walter F. Meier, Thomas J. L. Kennedy, and *Geo. A. Meagher*, for respondent.

The Attorney General and *John A. Homer, Assistant, amici curiae.*

PER CURIAM.—This case is in all respects like the case of *State ex rel. McBride v. Superior Court, ante* p. 409, 174 Pac. 973. All the questions presented in this case are decided in that case adversely to the contention of the relator. For the reasons therein stated, the writ is denied.

[No. 14757. Department One. September 23, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. JERRY YOUNG, *Appellant.*[2]

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered October 5, 1917, upon a trial and conviction of robbery. Affirmed.

N. M. Sorenson, for appellant.

Burt J. Williams and *N. A. Pearson*, for respondent.

PER CURIAM.—The defendants, Young, Blackwood and Schram, were jointly charged with committing the crime of robbery in Chelan county. Trial in the superior court for that county resulted in a verdict and judgment of conviction against the defendant Young, he being separately tried, from which he has appealed to this court.

There is presented upon this appeal the same questions, under substantially the same state of facts, as in the case of *State v. Blackwood, ante* p. 529, 175 Pac. 168. We think no further discussion of the questions so presented is necessary here. Some two or three additional errors are claimed in this case, but practically without argument or citation of authority. We think it is sufficient to say

[1]Reported in 174 Pac. 979.

[2]Reported in 177 Pac. 991.

with reference thereto that they do not show reversible error. We conclude that appellant has had a fair trial free from prejudicial error.

The judgment is affirmed.

[No. 14443. Department One. September 27, 1918.]

LEWIS RIETZ *et al.*, *Appellants*, v. JOHN T. CRUTCHER, *as Executor etc.*, *Respondent.*[1]

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered January 18, 1917, upon findings in favor of the defendant, in an action to establish a claim against the estate of a decedent, tried to the court. Affirmed.

Verne Towne and *Neill & Burgunder*, for appellants.
Fred E. Helwig and *Hanna & Hanna*, for respondent.

MAIN, C. J.—This action is based upon a claim presented to, and rejected by, the defendant, as executor of the last will and testament of Henry N. Jones, deceased. There were several items in the claim, one of which was a note for $2,500. The defendant, in his answer, plead as against this item that there was no consideration therefor, and that the deceased was not competent to transact business when the note was executed. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law and a judgment sustaining both of the mentioned defenses to the note. The plaintiffs appeal.

The controversy here is over the note, which was executed on September 22, 1915. Henry N. Jones, the maker of the note, died testate on the 26th day of October, 1915. At the time the note was executed, the deceased was almost eighty years of age, decrepit in body and with his mental faculties very much impaired. Whether he was competent on this date to transact business, such as making a note for the amount mentioned, is a question of fact. The trial court, by the findings and judgment, has denied such competency.

It would serve no useful purpose to review the evidence in detail on this question, which, of course, is conflicting. It may be said, however, that, after giving the evidence careful consideration, we are of the opinion that the findings and judgment of the trial court are right, not only upon the question of competency, but also upon the question of want of consideration, and that the judgment should be sustained.

Affirmed.

FULLERTON and PARKER, JJ., concur.

[1]Reported in 175 Pac. 293.

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31. APPEAL—REVIEW—HARMLESS ERROR. Whether a case was regularly set for trial is immaterial where the party had notice and appeared with his counsel and witnesses and had a trial. *Hoffman v. Schnatterly* 465

32. APPEAL—REVIEW—HARMLESS ERROR. In an action for medical services tried to the court, error in allowing witnesses to testify as to the value is harmless. *Terrill v. Fotheringham*..... 34

33. APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated upon the exclusion of evidence where the witness was later permitted to testify. *Sanders v. Pinney*..... 162

34. APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated upon giving an instruction where appellant had requested a similar one. *Sanders v. Pinney*..... 162

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

35. APPEAL—DECISION—STARE DECISIS. The principle of *stare decisis* will not be invoked when to do so perpetuates injustice and impairs statutory rights of property. *Olive Co. v. Meek*..... 467

36. APPEAL—DECISION—AFFIRMANCE—EXTENDING TIME FOR PAYMENT. Upon appeal in good faith from a judgment extending to appellant a privilege provided payment was made within a specified period, which expired pending appeal, affirmance of the judgment will be with an extension of time for exercising the privilege. *Moore v. Fremont State Bank*..... 249

37. APPEAL—DECISION—LIMITATIONS—EXTENSION. Where, on appeal from a judgment conditionally quieting title, the time therein limited to appellant for making payments due expired before the hearing, affirmance will be with the allowance of thirty days for making the payments. *Trahey v. Allen*..... 471

38. APPEAL—DECISION—JUDGMENT ON REMITTITUR—EFFECT—POWER TO VACATE. Where the judgment of the supreme court on appeal directed the making of certain conveyances and the doing of certain things within a specified time, or in the alternative, a money judgment, the final judgment of the superior court after remittitur, determining the sufficiency of the conveyances and whether or not the other things required had been done, is the judgment of the superior court which that court had jurisdiction to vacate on petition without first obtaining leave from the supreme court. *State ex rel. Hillman v. Superior Court*..... 288

Appearance:

As affecting bar of judgment, see JUDGMENT, 1.

1. APPEARANCE—GENERAL OR SPECIAL. Under Rem. Code, § 241, providing that every appearance is general unless the defendant in making the same states that the same is a special appearance, a motion to quash service of process reciting that the defendant appears specially and for the purpose of the motion only, is a special appearance. *Matson v. Kennecott Mines Co*..... 499

2. SAME—GENERAL OR SPECIAL—PLEADING OVER—WAIVER. Under Rem. Code, § 241, providing that every appearance is general unless the defendant in making the same states that the same is a special appearance, a special appearance on motion to quash service of process is not waived, after overruling of the motion and exceptions thereto, by answer on the merits praying for a dismissal and costs, where the special appearance was preserved in subsequent appearances and affirmative relief was not asked (overruling on rehearing, *Id.*, 101 Wash. 12). *Matson v. Kennecott Mines Co*..... 499

Application:

Of insurance money on enforcement of option contract to convey, see INSURANCE, 3, 4.

Appointment:

Of receiver for corporation, see CORPORATIONS, 6.
Of receiver, see RECEIVERS, 1.

Appropriation:

Of state funds, see STATES.

Argument of Counsel:

In criminal prosecutions, see CRIMINAL LAW, 13, 14, 19, 20.
Review as dependent on objection in lower court, see CRIMINAL LAW, 19, 20.

Asphalt:

Sale by city of product of asphalt plant, see MUNICIPAL CORPORATIONS, 3, 13.

Assessment:

Of benefits from drainage district, with review, as denial of due process of law, see CONSTITUTIONAL LAW, 2.
Of expenses of public improvements, see DRAINS, 2, 3; HIGHWAYS, 3, 4.
Payment of local assessment as condition precedent to foreclosure of tax lien, see TAXATION.

Assignment of Errors:

In civil actions, see APPEAL AND ERROR, 17.

Assignments:

Foreclosure of mortgage by assignee, see MORTGAGES, 3, 4.
Of school district warrants issued to agent in payment of claims against district, see SCHOOLS AND SCHOOL DISTRICTS, 3.

Assumption:

Of risk by employee, see MASTER AND SERVANT, 7-9.

Attachment:

See EXECUTION.

Attorney and Client:

Right to raise question of error in allowing attorney's fees, for first time on appeal, see APPEAL AND ERROR, 5.
Attorney's fees in action by county to interplead claims against contractor's bond, see COUNTIES, 2.
Argument and conduct of counsel at trial in criminal prosecution, see CRIMINAL LAW, 13, 14, 19, 20.
Allowance of attorney fees, see EXECUTORS AND ADMINISTRATORS.
Attorney's fees in action for rent, see LANDLORD AND TENANT, 8.
Allowance of attorney's fees to receiver, see RECEIVERS, 2.

1. ATTORNEY AND CLIENT—AUTHORITY TO BEGIN SUIT—EVIDENCE—SUFFICIENCY. An action of unlawful detainer to recover leased premises, upon which the tenant had erected valuable improvements, must fail for want of the attorney's authority to commence it, where the lessees were absent from the state, and endeavored in good faith by telegraph to make an adjustment of a bona fide dispute for taxes, and the plaintiff's attorney, whose only authority at the time was to consider the adjustment and wire advice, took advantage of the lessees' absence and precipitated the unlawful detainer suit, after three days' notice by mailing and leaving copies on the premises. *Waterman v. Robertson*..... 553

2. ATTORNEY AND CLIENT—COMPENSATION — EVIDENCE — SUFFICIENCY. Under a contract for reasonable compensation, attorneys are entitled to a fee of $3,000 for successfully representing a county in a suit to set aside invalid bonds in the sum of $125,000, requiring the exercise of legal skill and ability of a high order, three attorneys having testified that $2,500 to $3,500 would be a reasonable charge. *Donworth & Todd v. Benton County*..... 382

3. ATTORNEY AND CLIENT—COMPENSATION — CONTRACT — EVIDENCE — SUFFICIENCY. The signing and returning of a complaint to commence suit sufficiently shows acceptance of an offer to take the case on the contingent fee proposed by the attorneys. *Schulze v. Jones & Riddell* 664

Authority:

Of attorney, see ATTORNEY AND CLIENT, 1.
Of bank officers, see BANKS AND BANKING, 2.
Of broker, see BROKERS, 1.
Of state board of health as to detention of persons in quarantine, see HEALTH, 5.
Of trustees to limit proxy voting by officers at stockholders' meeting, see INSURANCE, 1.
Of agent, see PRINCIPAL AND AGENT.

Automobiles:

Liability of owner for injuries by employee, see MASTER AND SERVANT, 12, 13.
Collision with in city street, see MUNICIPAL CORPORATIONS, 6, 9, 10.
Negligence of driver of automobile struck by car, see STREET RAILROADS, 5.

Bankruptcy:

Jurisdiction of particular courts, see COURTS.

1. BANKRUPTCY — JURISDICTION — INSOLVENT CORPORATION — CLAIMS AGAINST STOCKHOLDERS. After appointment of a trustee in bankruptcy for an insolvent corporation, creditors making claim against stockholders on their unpaid stock subscriptions must wage their causes in the bankruptcy proceeding, the Federal courts being vested with exclusive jurisdiction, and the trustee being charged with the duty of reducing unpaid stock subscriptions, if necessary, for the benefit of creditors. *DeMuth v. Faw*..... 279

2. SAME—RIGHTS OF CREDITORS—CLAIMS. Creditors must file their claims with the trustee, and seek protection by appeal to the referee, rather than prosecute independent actions because of dissatisfaction with the trustee's acts. *DeMuth v. Faw*..... 279

3. BANKRUPTCY — ACTION BY TRUSTEE—PLEADING—INSUFFICIENCY OF ASSETS. Since a trustee in bankruptcy has no greater rights than the creditors, in an action to obtain possession of property of the bankrupt fraudulently conveyed or subject to creditor's liens, he must allege and prove that he has not sufficient assets in his hands to satisfy claims of creditors of the bankrupt. *Hibschman v. Bevis*..... 317

Banks and Banking:

1. BANKS AND BANKING—POWERS—PURCHASE OF STOCK — STATUTES. Banking corporations may purchase and hold stock in general corporations; in view of Laws 1905, p. 51 (Rem. Code, § 3684), authorizing corporations generally to purchase and hold stock in other corporations, which was not impliedly repealed, except as to certain classes named, by subsequent legislation, Laws 1907, p. 518, § 15 and its amendments (Rem. Code, §§ 3290, 3292, and Laws 1917,

Banks and Banking—Continued.

p. 271) prohibiting a banking corporation from holding its own stock or the stock of any other banking corporation, excepting the stock of Federal Reserve banks and trust companies. *Moore v. Fremont State Bank*..... 249

2. BANKS AND BANKING—AUTHORITY OF OFFICERS—DEEDS... A deed by a bank president and cashier who were principal stockholders, executed without special authority and acquiesced in by the directors, is within the apparent scope of their authority. *Farmers & Mechanics Bank v. Western Loan & Building Co*..... 349

Bar:

Of action by former adjudication, see JUDGMENT.
Of action by limitation, see LIMITATION OF ACTIONS.

Beneficial Associations:

Mutual benefit insurance, see INSURANCE, 5.

Benefits:

Assessment for construction of drainage district, see DRAINS, 2, 3.
Assessment of property for benefits from highway improvement, see HIGHWAYS, 3, 4.
Mutual benefit insurance, see INSURANCE, 5.

Bill of Particulars:

In pleading in civil action, see PLEADING, 4.

Bills and Notes:

Authority of agent to cash checks, see PRINCIPAL AND AGENT, 2.
Separate and community liability of husband and wife, see HUSBAND AND WIFE, 3.
Directing verdict in action on notes, see TRIAL, 4.

1. BILLS AND NOTES—DISCHARGE—MAKERS AS OWNERS—RIGHTS OF THIRD PARTIES—STATUTES. The makers of a note who became the owners before maturity and put it up as security for a bond issue are not discharged by the operation of Rem. Code, § 3509, providing for the discharge of the principal debtor who becomes the holder of the instrument at or after maturity; since the statute does not apply as to a person not a party to the instrument where the principal debtors admit it is still in force, and since the makers, though owners, were not the holders and became owners before maturity. *State Finance Co. v. Moore*..... 298

2. BILLS AND NOTES—PAYMENT—EVIDENCE—SUFFICIENCY. Oral evidence of the payment of a note by checks is insufficient, where it appears that the note was not surrendered or demanded, no written acknowledgment of payment or intent to pay was made, the note was then held as collateral by a bank, to the knowledge of the parties, and one of the payors had admitted that it was still a binding obligation of the maker. *Hanson v. Moses Investment Co*..... 218

Board of Health:

See HEALTH, 1, 4, 5.

Bona Fide Purchaser:

Of school district warrants, see SCHOOLS AND SCHOOL DISTRICTS, 3.
Corporation as *bona fide* purchaser of leases, see CORPORATIONS, 5.
Of crops subject to lien for rent, see LANDLORD AND TENANT, 9.

Bonds:

Contractors' bonds, see COUNTIES, 1, 2.
Sureties on bonds, see PRINCIPAL AND SURETY.
Sureties on contractor's bonds, see GUARANTY, 2, 3.
Official bonds, see OFFICERS.

Books:

Inspection of corporate books and records by stockholders, see CORPORATIONS, 4.
Secondary evidence of contents, see EVIDENCE, 2.

Boundaries:

Of public lands, see PUBLIC LANDS.

Breach:

Damages for breach of contract, see DAMAGES, 1.
Of covenant to put vendee in possession under contract for sale of timber, see LOGS AND LOGGING, 1, 2, 5.

Briefs:

Assignment of errors in, see APPEAL AND ERROR, 17.

Brokers:

Contracts for commissions, as affected by statute of frauds, see FRAUDS, STATUTE OF, 2.

1. BROKERS—AUTHORITY TO MAKE SALE—COMMISSIONS — EVIDENCE—SUFFICIENCY. Where a broker, making a sale subject to confirmation, telegraphed explicit terms based on a price list of a certain date, specially mentioning part at less than list, which was accepted by telegraph, he had authority to close the particular sale, notwithstanding that, two hours before closing the formal contract, he received through the mails an amended price list advancing prices over the list on which the sale was made; and he was therefore entitled to his commissions. *Marischal v. Winslow Lumber Co.* 572

2. BROKERS — CONTRACT—CONSTRUCTION—TIME FOR PAYMENT. A contract for a broker's commissions payable on or before a certain date, as follows: "one-half when a certain mortgage was sold," which sale was within the control of the owner, requires payment by such date. *Henneberg v. Cook*..... 685

Brokers—Continued.

3. BROKERS — ACTIONS FOR COMMISSIONS — EVIDENCE — SUFFICIENCY. In an action for a commission, by a broker who procured a lender, able and willing to make the loan, it was not necessary to show termination of a timber cruise, which the borrower had started to satisfy the lender, who accepted in advance of the cruise. *West & Wheeler v. Dierssen*..... 28

Building Contracts:

Construction of, see CONTRACTS, 4.

Right to counterclaim for materials paid for, in action for balance due, see SET-OFF AND COUNTERCLAIM, 1.

Buildings:

Mausoleums as nuisance, see NUISANCE, 1.

Burden of Proof:

Good faith of transaction between husband and wife, see FRAUDULENT CONVEYANCES, 2.

To rebut presumption of guilt from possession of intoxicating liquors, see INTOXICATING LIQUORS, 2.

Wrongful diversion of local improvement fund, see MUNICIPAL CORPORATIONS, 11.

In action for loss of vessel by charterer, see SHIPPING.

Cancellation of Instruments:

Right to jury trial in action to rescind contract for exchange of land, see JURY.

Rescission of contract of sale of land, see VENDOR AND PURCHASER, 6.

1. CANCELLATION OF INSTRUMENTS — JUDGMENT — RELIEF GRANTED. In granting cancellation of deeds and rescission of a trade of properties, including much personal property, after the lapse of two years, during which changes occurred in the property and its market value, it is not error to refuse to decree a return of the personal property to the plaintiff, where there was no evidence upon which a fair valuation can be placed thereon; especially where there was such confusion in the pleadings that there was no admission as to the present value of any of the personal property involved, and no evidence as to what personalty remained on the place and was covered by the decree. *Edendale Land Co. v. Cortelyou*..... 353

Carriers:

1. CARRIERS—STREET RAILWAYS—REGULATION OF RATES—POWERS OF PUBLIC SERVICE COMMISSION — ABROGATION OF FRANCHISE — POLICE POWER. Under the public service commission act, Rem. Code, § 8626-53, authorizing the commission to fix reasonable rates and fares for carriers sufficient to yield a reasonable income, the commission has power to abrogate a preexisting franchise provision re-

Carriers—Continued.

quiring the sale of commutation tickets at a certain price; since the city could not bind itself as against the state's exercise of the police power in fixing reasonable rates. *State ex rel. Seattle v. Public Service Commission* 72

2. SAME — RATES — REGULATIONS — EVIDENCE — SUFFICIENCY. Relief from a franchise provision requiring a street railway company to issue twenty-five-ride commutation tickets for $1.00 without transfer privilege, is warranted where the proof showed that the company was not receiving any net returns, there was a deficit at the time of the hearing, and the returns of the company, not considering depreciation, were less than two per cent upon the actual cost of the railway system. *State ex rel. Seattle v. Public Service Commission* 72

3. SAME—RATES—REGULATION—CONDITIONS PRECEDENT — VALUATIONS —STATUTES. Rem. Code, § 8626-92, providing that the public service commission shall "as early as practicable" ascertain the cost of construction and equipment, does not require an independent valuation of a street railway system prior to fixing reasonable rates for passenger fares. *State ex rel. Seattle v. Public Service Commission* 72

4. CARRIERS—DISCRIMINATION — CONSTITUTIONAL AND STATUTORY PROVISIONS. The constitutional and statutory provisions against discrimination by carriers, with the proviso (Rem. Code, § 8626-18) that nothing therein shall prevent the issuance of commutation tickets, give the carrier the right to issue temporary commutation tickets at its discretion. *State ex rel. Seattle v. Public Service Commission* 72

5. CARRIERS—OF GOODS—REFUSAL TO ACCEPT GOODS—LIABILITY. It was the duty of a carrier to accept the shipment and it is liable for refusal to do so, where, after a car of apples had been loaded, the carrier refused to accept the shipment pursuant to its tariff regulations, option No. 2, giving heater service and requiring the carrier to assume all liability for loss due to frost or heating, because a dispute arose as to whether the apples had been frost-bitten before loading, and the shipper then offered to indemnify the company against any claim for damages on that account, as it would in no event be liable therefor. *Spokane Valley Growers' Union v. Spokane & Inland Empire R. Co.* 587

6. CARRIERS — PASSENGER DEPOTS — REGULATIONS — REASONABLENESS. Railroads having the right at common law to enforce reasonable rules for the conduct of business, and the railroad commission having adopted no rules as to the time for keeping company's station rooms open, as empowered in Rem. Code, § 8626-85, a passenger, in order to recover damages from the company's failure to keep its waiting room open between the hours of 4:30 and 8 a.m., must

Carriers—Continued.

allege and prove that its rules providing therefor are unreasonable. *Davenport v. Chicago, Milwaukee & St. Paul R. Co.*..... 645

7. SAME—PASSENGER DEPOTS — ACTIONS FOR DAMAGES — DEFENSES—EVIDENCE. In an action for damages by a passenger through a railroad's failure to keep its waiting room open, the defendant, under a general denial, is entitled to prove that the closing was in accordance with its regularly established rules, and facts tending to show its reasonableness, including the fact that the public service commission has adopted no rule on the subject. *Davenport v. Chicago, Milwaukee & St. Paul R. Co.*..... 645

8. SAME—PASSENGER'S—EJECTION—DAMAGES—MENTAL ANGUISH. The fact that a passenger was told that he would "have to get out of here," on closing a waiting room, is not sufficient to carry the case to the jury upon the issue of suffering mental anguish from insulting language. *Davenport v. Chicago, Milwaukee & St. Paul R. Co.*..... 645

Cause of Action:

Splitting cause of action as harmless error, see APPEAL AND ERROR, 29.

Certificate:

To statement of facts or bill of exceptions, see APPEAL AND ERROR, 14, 15.

Change of Grade:

Limitation of action for injury to property from, see LIMITATION OF ACTIONS, 1.

Change of Venue:

Of civil actions, see VENUE.

Charge:

To jury in criminal prosecutions, see CRIMINAL LAW, 15, 23.
To jury in civil actions, see TRIAL, 6.

Charitable Bequests:

See PERPETUITIES.

Charters:

Negligence in loss of vessel, see SHIPPING.

Checks:

Authority of agent to cash checks, see PRINCIPAL AND AGENT, 2.

Child:

Custody of delinquent child, see INFANTS.

Cities:

See MUNICIPAL CORPORATIONS.

Claim and Delivery:

Recovery of property wrongfully levied upon, see EXECUTION.

Claims:

As determining amount in controversy on appeal, see APPEAL AND ERROR, 1.
Of creditors, see BANKRUPTCY, 1, 2.
Against bond of contractor on public work, see COUNTIES, 1, 2.
Assertion of contrary claims, see ESTOPPEL, 2.
To property levied on, see EXECUTION.
Guaranty by surety of claim against bond of contractor, see Guaranty, 3.
Filing claim against county as tolling statute, see LIMITATION OF ACTIONS, 3.
Of lien, waiver, see MECHANICS' LIENS, 3.
Mining claims, see MINES AND MINERALS.
Against school districts, see SCHOOLS AND SCHOOL DISTRICTS, 2, 3.

Collateral Attack:

In contempt proceedings, see CONTEMPT.

Collision:

Between mule train and timber truck in mine, see MASTER AND SERVANT, 11.
Between vehicles and persons using streets, see MUNICIPAL CORPORATIONS, 6, 9, 10.
Between street cars, or with vehicles, see STREET RAILROADS, 5.

1. COLLISION—CONTRIBUTORY NEGLIGENCE—FAILURE TO CARRY LIGHT—TRIAL—INSTRUCTIONS. Under Fed. Stat. Ann. 158, requiring vessels at anchor to carry a light, upon an issue as to whether a light was carried by defendant's pile-driver at anchor when struck by a steamboat, plaintiff is entitled to an instruction that it would be negligence *per se* not to carry a light. *Houchen v. Oregon-Washington R. & Nav. Co.*..... 598

2. COLLISION — DAMAGES — MEASURE OF DAMAGES — INJURY TO PILE-DRIVER. The elements of the measure of damages for the sinking of a pile-driver that could not be procured on the market at any time, are the replacing it in condition so far as possible, coupled with depreciation in value and the loss of use, if any, which includes the cost of raising and repairing, etc., the total recovery not to exceed the value at the time and place of the accident. *Houchen v. Oregon-Washington R. & Nav. Co.*..... 598

3. COLLISION—NEGLIGENCE—RIGHT OF NAVIGATION—INSTRUCTIONS. In an action for damages from a collision when a steamboat ran into a pile-driver anchored near fish traps, an instruction that the right of navigation with reasonable regard to the rights of others is paramount to any other use of navigable waters, is properly given;

Collision—Continued.

and it is proper to refuse a requested instruction that the right to construct fish traps is subordinate at all times to the superior right of navigation and that steamboats may operate over any water of sufficient depth provided they act without wantonness or malice. *Houchen v. Oregon-Washington R. & Nav. Co*..... 598

4. SAME—NEGLIGENCE—PRESUMPTIONS—INSTRUCTIONS. In an action for damages from collision when a steamboat ran into a pile-driver at anchor, the jury should be instructed that there is a presumption of law that it was the fault of the vessel in motion unless the pile-driver was not anchored in a proper place or not showing a proper warning light. *Houchen v. Oregon-Washington R. & Nav. Co*.... 598

Color of Title:

Necessity to sustain adverse possession, see ADVERSE POSSESSION, 1.

Comment:

By judge at criminal trial, see CRIMINAL LAW, 10, 11.

Commerce:

Carriage of goods and passengers, see CARRIERS.
Applicability of employers' liability act to railroad employees, see MASTER AND SERVANT, 2, 3.

Commissions:

Of broker, see BROKERS.

Common Carriers:

See CARRIERS.

Community Property:

In general, see HUSBAND AND WIFE.

Commutation Tickets:

See CARRIERS, 1-4.

Compensation:

Of attorney, see ATTORNEY AND CLIENT, 2, 3.
Of broker, see BROKERS.
Allowance of attorney's fees, see EXECUTORS AND ADMINISTRATORS.
Fixing attorney's fees in action for rent, see LANDLORD AND TENANT, 8.
Of receiver, see RECEIVERS, 2.

Competency:

Of experts as witnesses, see EVIDENCE, 3, 4.

Complaint:

Amendment on appeal from justice court, see CRIMINAL LAW, 1, 2.
In civil action, see PLEADING, 1.

Compromise and Settlement:

1. COMPROMISE AND SETTLEMENT—EVIDENCE—SUFFICIENCY. The evidence sustains findings that a compromise and settlement was not binding where the written memorandum shows a misunderstanding and it appears that material misrepresentations were made and relied upon when the compromise was under discussion. *Electric Sales Corporation v. Radford*..... 130

Computation:

Of period of limitation, see LIMITATION OF ACTIONS, 1, 3.

Conclusion:

Of witness, see EVIDENCE, 3, 4.

Conclusiveness:

Of judgments, see JUDGMENT.

Condition:

Precedent to fixing street railway rates by public service commission, see CARRIERS, 3.
Precedent to foreclosure of tax certificate, see TAXATION.

Conditional Sales:

See SALES, 3-5.

Conduct of Counsel:

In criminal prosecutions, see CRIMINAL LAW, 14, 19, 20.

Confessions:

Admissibility in evidence, see CRIMINAL LAW, 6, 7.

Consideration:

Estoppel to assert want of for abrogation of lease, see ESTOPPEL, 1.
For abrogation of lease, see LANDLORD AND TENANT, 3.

Conspiracy:

1. CONSPIRACY—DAMAGES—EVIDENCE—SUFFICIENCY. An action for damages for conspiracy to injure plaintiff's business is not sustained where there was no evidence that plaintiff's business was injured by the acts complained of, and it appears that the suit was not the result of any injury done, but plainly brought to annoy defendants. *Mathison v. Anderson*..... 449

Constitutional Law:

Discrimination in rates, see CARRIERS.
Right of accused to confront witnesses, see CRIMINAL LAW, 12.
Collection and disbursement of state funds, see STATES.

1. CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWERS — HEALTH LAWS. Health ordinances relating to quarantine are not un-

Constitutional Law—Continued.

constitutional as an unlawful delegation of legislative authority because they leave to health boards definitions and classifications of disease. *State ex rel. McBride v. Superior Court*..... 409

2. CONSTITUTIONAL LAW—DUE PROCESS—SPECIAL ASSESSMENTS—REVIEW BY COURTS—NECESSITY. The drainage district law, Rem. Code, §§ 4226-1 to 4226-41, does not violate the due process clauses of the state and Federal constitutions, in that it provides for special assessment without the medium of any review by the courts; due process being afforded when there is opportunity to be heard before the body which is to make the assessment. *Oregon-Washington R. & Nav. Co. v. Board of Commissioners of Yakima County*..... 480

Construction:

Of contracts, see CONTRACTS, 4.
Of health and quarantine laws, see HEALTH, 2.
Of contract of sale, see SALES, 2, 3.

Contempt:

Disobedience of order for alimony, see DIVORCE, 3.

1. CONTEMPT — JURISDICTION — JUDGMENT—COLLATERAL ATTACK. In contempt proceedings for interfering with property seized under the abatement statute, while lack of jurisdiction to enter the order of abatement may be raised collaterally, it will not be tried out as an abstract question; and the court having jurisdiction of the subject-matter, the order must be absolutely void to work a purging of the contempt; since mere irregular or improvident exercise of jurisdiction cannot avail one who laid claims to property in a collateral proceeding. *Simon Piano Co. v. Fairfield*..... 206

Continuance:

In criminal prosecutions, see CRIMINAL LAW, 8.

1. CONTINUANCE—GROUNDS—ABSENCE OF WITNESSES—DILIGENCE. It is not an abuse of discretion to refuse a continuance to secure the testimony of a witness upon a subject put in issue by the pleadings and a matter of dispute throughout the case, where it would have been merely cumulative and there was want of diligence in not subpoenaing him. *Hill v. Arthur*..... 187

2. CONTINUANCE — GROUNDS — WANT OF PREPARATION. It is not an abuse of discretion to refuse a second continuance, where, upon plaintiff's first application, conditions were imposed and plaintiffs, on the day set, refused to comply with the conditions, expecting the case would be dismissed, and were therefore not prepared for trial when the adversary waived the conditions; it further appearing that some of the witnesses were in the city and most of them in the county and opportunity was offered to subpoena them. *Reser v. Labude*..... 228

Contractors:

On public work, see COUNTIES, 1, 2; MUNICIPAL CORPORATIONS, 2.
Guaranty of payment of loan to contractor, see GUARANTY, 2, 3.

Contracts:

See PARTNERSHIP.
Right to raise question of authority to execute, for first time on appeal, see APPEAL AND ERROR, 4.
Review of verdict for damages for breach of, see APPEAL AND ERROR, 26.
For attorney's fees, see ATTORNEY AND CLIENT, 3.
Compensation of broker, see BROKERS, 2.
Compromise, see COMPROMISE AND SETTLEMENT.
Sale of corporate stock, construction, see CORPORATIONS, 1, 2.
Of counties, see COUNTIES, 1, 2.
Covenants in deeds, see COVENANTS.
Damage for breach, see DAMAGES, 1.
Estoppel by contract, see ESTOPPEL, 1.
Agreement for exchange of property, see EXCHANGE OF PROPERTY.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Of guaranty, see GUARANTY.
With county for state highway, see HIGHWAYS, 2.
Of husband or wife, see HUSBAND AND WIFE, 1-3.
Of indemnity, see INDEMNITY.
Of insurance in general, see INSURANCE.
Lease, see LANDLORD AND TENANT.
Sale and removal of timber, see LOGS AND LOGGING.
For street lighting, construction of, see MUNICIPAL CORPORATIONS, 1.
For public improvements, see MUNICIPAL CORPORATIONS, 2.
Of suretyship, see PRINCIPAL AND SURETY.
Sales of personalty, see SALES.
Claims arising out of contract as subject to set-off, see SET-OFF AND COUNTERCLAIM.
Sale of land, see VENDOR AND PURCHASER.

1. CONTRACTS — OFFER AND ACCEPTANCE — CONDITIONAL ACCEPTANCE. An offer to make a loan on condition that the lender write one-half of the fire insurance, does not become binding on acceptance with agreement to write such insurance "upon expiration of present policies," as the acceptance was conditional. *Sillman v. Spokane Sav. & Loan Society*..... 619

2. SAME. An offer to make a loan, the lender adding that "we will expect" to write half the fire insurance, adds a material condition that must be accepted unconditionally. *Sillman v. Spokane Sav. & Loan Society* 619

3. CONTRACTS — ILLEGALITY — PUBLIC POLICY — INTERFERENCE WITH JUSTICE. A contract for the dismissal of a stockholder's action for

Contracts—Continued.

the appointment of a receiver is void as against public policy, where it provided that, in consideration of a certain sum to be paid plaintiff, the action was to be dismissed, the papers not filed, and no information of it given to any person, the president having a prospective purchaser for the corporation, and other creditors benefited by the suit being deprived of their remedy to the advantage of the plaintiff. *Eggleston v. Pantages*..... 458

4. CONTRACTS—BUILDING CONTRACTS—CONSTRUCTION—"ROUGHING-IN" PLUMBING—EXTRAS—PROOF OF CUSTOM. Where the contractor furnished a list of the materials required for "roughing-in" the plumbing "the same being represented to include all the material necessary to be used in the plumbing" in accordance with the plans and specifications, further guaranteeing that no extras will be required to complete the building, it was not competent for the contractor to show a custom in the plumbing trade to make contracts with reference to "roughing-in" and the supplying of fixtures, so as to leave a hiatus between the "roughing-in" process and the setting of the fixtures, and make the owner liable for extra material for "finishing"; no such custom having been brought to the notice of the owner. *Donaldson v. Brewster*..... 65

5. CONTRACTS—ACTIONS—DEFENSES—ILLEGALITY OF PAYMENTS—WHO MAY ASSERT. In an action on contract to furnish and pay laborers for fish canning, the fact that some of the laborers illegally received part of their pay from plaintiff in intoxicating liquors cannot be asserted as a defense; since only the laborers might raise that question. *Seid Chee v. Sanitary Fish Co*..... 345

6. CONTRACTS—PERFORMANCE—ACTIONS—EVIDENCE—ADMISSIBILITY. In an action on a contract to furnish Chinese and Japanese laborers, at specified sums per month, in which the intent of the parties that the contractor pay the laborers was shown by the accounts rendered, it is proper to allow the plaintiff to testify that he had paid the various sums to the laborers. *Seid Chee v. Sanitary Fish Co*.... 345

Contributory Negligence:

Failure to display light on anchored pile-driver, see COLLISION, 1.
Of servant, see MASTER AND SERVANT, 10.
Of person injured by collision in street, see MUNICIPAL CORPORATIONS, 6.
Of owner of goods destroyed by fire, see NEGLIGENCE, 2.
Of driver of automobile struck by street car, see STREET RAILROADS, 5.

Conversion:

Wrongful conversion of personal property, see TROVER AND CONVERSION.

Conveyances:

In general, see DEEDS.
In fraud of creditors, see FRAUDULENT CONVEYANCES.
As security for debt, see MORTGAGES.

Corporations:

Claims of creditors against stockholders on unpaid subscriptions, see BANKRUPTCY, 1, 2.
Purchase of stock in other corporations, see BANKS AND BANKING, 1.
Agreement to dismiss stockholder's action for appointment of receiver as violating public policy, see CONTRACTS, 3.
Secondary evidence of contents of corporate books, see EVIDENCE, 2.
Liability of third person on guaranty of performance of agreement to pay corporate debts, see GUARANTY, 1.
Proxy voting by officer at stockholder's meeting, see INSURANCE, 1.
Proof of incorporation of company, as owner of stolen property, see LARCENY, 1.

1. CORPORATIONS—STOCK—SALE—CONTRACT — CONSTRUCTION. Where plaintiff sold 10,000 shares of capital stock to defendant, by contract providing that 3,000 shares were to belong to the buyer on payment of $2,500, and same was to be pledged to secure the performance of the buyer's agreement to save the seller harmless from her indebtedness to the company on account of advancements of future dividends, and the balance, 7,000 shares, to be placed in escrow until paid for, and all except the 3,000 shares to be fully forfeited as liquidated damages in case of default in payments, it was not intended to require a payment of the advances made in any event, but only to save harmless therefrom if the contract be fully performed; and the contract having been forfeited by the seller as to the 7,000 shares for defaults, it carried its own measure of damages in the sums paid and forfeited, and the seller cannot recover anything in addition, the 7,000 shares being burdened for advances as if no contract had been made. *Friedman v. Padmore*..... 562

2. CORPORATIONS—STOCK—CONTRACT OF SALE — DIVIDENDS—CONSTRUCTION. Where the by-laws of a warehouse company provided for two kinds of dividends, (1) a flat rate based on the shares of stock, and (2) participatory in surplus in proportion to the volume of business done by members, a sale of shares in which the buyers agreed to pay the seller any dividends due upon his stock, applies only to the flat or stock dividends, and does not render them liable for subsequently declared participatory dividends in which the seller was treated by the corporation as a non-member; since the by-laws imposed the condition of doing business with the company to share in the participatory dividend, irrespective of owning stock; and his remedy, if any, was against the corporation declaring the dividend, and not against the stockholders upon their contract of purchase. *Johnson v. Goodenough*..... 625

Corporations—Continued.

3. SAME. In such a case, it would be incumbent on the seller to show the amount of business transacted by participating members and by himself, in order to show the amount he would be entitled to on a participatory dividend. *Johnson v. Goodenough*..... 625

4. CORPORATIONS — STOCKHOLDERS — INSPECTION OF BOOKS. A trade competitor of a corporation cannot, by acquiring a small amount of dormant stock, demand an inspection of the corporate books, minutes, and trade secrets, in the absence of any by-law on the subject of inspecting records; and it appearing that the demand was not in good faith and not in the best interests of the corporation, the inspection allowed will be confined to the book containing the names of the stockholders, according to Rem. Code, § 3701. *State ex rel. Beaty v. Guarantee Manufacturing Co*..... 151

5. CORPORATIONS—REPRESENTATION BY OFFICERS—NOTICE—BONA FIDE PURCHASER. A corporation taking oil and gas leases from its officers who had full notice of adverse rights of third persons is not an innocent purchaser. *Walla Walla Oil, Gas & Pipe Line Co. v. Valentine* 359

6. CORPORATIONS—INSOLVENCY—RECEIVERS — COMPLAINT — SUFFICIENCY. A complaint for appointment of a receiver of an insolvent corporation sufficiently shows mismanagement and insolvency, irrespective of the fraud alleged, where $10,000 received had been mostly expended and not accounted for, and with income not exceeding two or three hundred dollars a year, the officers had voted themselves salaries amounting to $750 a month; making a sufficient showing for the appointment of a receiver. *Kahle v. Industrial Loan & Investment Co.*..... 273

Corroboration:

Of witness in general, see WITNESSES, 7.

Counterclaims:

See SET-OFF AND COUNTERCLAIM.

Countersigning:

School district warrants, see SCHOOLS AND SCHOOL DISTRICTS, 1.

Counties:

Establishment of drains, see DRAINS.
Contracts for state highway improvement, see HIGHWAYS, 2.
Filing claim against as tolling statute, see LIMITATION OF ACTIONS, 3.
Implied repeal of statute giving right of action against for torts, see STATUTES.

1. COUNTIES—CLAIM AGAINST BOND—CONTRACT. The bond to secure claims against a contractor on county work covers sums due for the rental value of scows and other equipment used by the contractor for handling concrete and also the rental value of tugs

Counties—Continued.

which towed scows loaded with material that entered into the construction. *King County v. Guardian Casualty & Guaranty Co.*... 509

2. SAME—CLAIM AGAINST BOND—ATTORNEY'S FEES. Semble, that where there is a controversy, attorney's fees are allowable to claimants in an action by a county to interplead claims against a contractor's bond. *King County v. Guardian Casualty & Guaranty Co.* 509

3. COUNTIES — LIABILITIES — TORTS — ACTS OF DEPUTY SHERIFF. A deputy sheriff, in charge of automobiles used by the sheriff's office, is not, while testing an automobile, engaged in the performance of any official acts of the sheriff for which the county is not liable, under Rem. Code, § 3987; hence the county is liable for personal injuries caused through the negligent driving by such deputy. *Arishin v. King County*..... 176

County Roads:

See HIGHWAYS.

Courts:

Review of decisions, see APPEAL AND ERROR.
Power to vacate judgment after remand, see APPEAL AND ERROR, 38.
Jurisdiction in bankruptcy, see BANKRUPTCY, 1.
Contempt of court, see CONTEMPT.
Power to limit number of expert witnesses to make deposition, see DEPOSITIONS.
Suits for divorce, see DIVORCE.
Review in habeas corpus to produce person detained in quarantine, see HEALTH, 5.
Jurisdiction over delinquent child, see INFANTS, 1.
Power to modify order for custody of delinquent child, see INFANTS, 2.
Right to trial by jury, see JURY.
Fixing attorney's fees in action for rent, see LANDLORD AND TENANT, 8.
Province of court and jury, see TRIAL, 4.

1. COURTS—JURISDICTION—RELIEF. Where the state court had no jurisdiction of claims against a bankrupt, it must dismiss the cause without attempting to determine the merits which were exclusively within the jurisdiction of the Federal court. *DeMuth v. Faw*... 279

Covenants:

To put in possession, in contract for sale of timber, see LOGS AND LOGGING, 1..

1. COVENANTS—WARRANTY—HIGHWAY AS "INCUMBRANCE." A public highway is not an incumbrance sustaining an action for breach of covenant of warranty. *Walquist v. Johnson*..... 30

Credibility:

Of witness, see WITNESSES, 4, 5, 7.

Creditors:

See FRAUDULENT CONVEYANCES.
Prosecution of claims in bankruptcy, see BANKRUPTCY, 1, 2.
Rights of subsequent creditors as to after-acquired property of vendee in conditional sales contract, see SALES, 4.

Cremation Societies:

Damages for failure to keep and deliver ashes of child, see DEAD BODIES.

Criminal Law:

See FALSE PRETENSES; LARCENY; ROBBERY.
Violation of fish laws, see FISH.
Allegations in indictment, see INDICTMENT AND INFORMATION, 2.
Violation of liquor laws, see INTOXICATING LIQUORS.
Practice of dentistry without license, see PHYSICIANS AND SURGEONS.
Examination of witnesses in criminal action, see WITNESSES, 3-7.

1. CRIMINAL LAW—COMPLAINT—AMENDMENT ON APPEAL FROM JUSTICE OF PEACE. Upon appeal from a conviction in justice court, if the complaint did not charge a crime, the prosecution may file a new complaint in the superior court upon which trial proceeds after arraignment and plea. *Seattle v. Savage*..... 71

2. CRIMINAL LAW—APPEAL TO SUPERIOR COURT—COMPLAINT—AMENDMENT. Upon appeal from justice court, the complaint, if not sufficiently definite, is subject to amendment on appeal to the superior court. *State v. Koerner*..... 516

3. CRIMINAL LAW—APPEAL FROM JUSTICE COURT—DISMISSAL—LACK OF DILIGENCE. One convicted in justice court of selling intoxicating liquors is guilty of laches in prosecuting his appeal to the superior court, where there were but three jury terms a year, all of which he allowed to pass following conviction without bringing the case on for trial; and it is not sufficient excuse to avoid dismissal that his attorney had agreed to notify him when wanted, where the attorney died in May and he took no steps to employ another before the September term. *State v. Koerner*..... 516

4. CRIMINAL LAW—EVIDENCE—MOTIVE. Where there was abundant evidence to identify the accused as one of the parties committing an assault by firing a revolver at the prosecuting witness, it is not necessary to show a motive for the assault. *State v. Harry John* 189

5. CRIMINAL LAW—EVIDENCE—INTENT—OTHER CRIMES. In a prosecution for selling morphine without a physician's prescription, proof of giving dry morphine on a prescription calling for morphine in

Criminal Law—Continued.

solution was sufficient proof of intent to establish criminality; hence it was error to admit evidence of other illegal sales of morphine to other persons for the purpose of establishing intent. *State v. Smith* 267

6. CRIMINAL LAW—EVIDENCE—CONFESSIONS. Whether a confession of illegal possession of whiskey was obtained by duress is irrelevant where the accused testified on the stand to everything in the confession save only that he testified that he "thought" it was whiskey. *State v. Johnson*..... 59

7. CRIMINAL LAW—EVIDENCE—CONFESSIONS—DURESS. An accused's voluntary confession, deliberately signed, is not tainted with duress or coercion from the fact that when arrested he was taken before the mayor, who was a justice of the peace and attorney, and the deputy sheriff, the prosecuting attorney and others. *State v. Seablom* 53

8. CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESSES. It is not error to refuse a third continuance to obtain the presence of witnesses who were nonresidents of the state and whose attendance was optional and there was no certainty that it could be obtained. *State v. Millroy* 193

9. CRIMINAL LAW—TRIAL—REMARKS BY COURT. In a prosecution for the illegal possession of whiskey, it is not prejudicial error for the judge to say that the court never ordered a witness not to tell the truth, when the prosecutor asked whether another implicated with the accused "came up on the stand, under the order of the court, and refused to tell the truth." *State v. Seablom*..... 53

10. CRIMINAL LAW—TRIAL—MISCONDUCT OF JUDGE—COMMENT. It is unlawful comment for the court to instruct the jury to view with caution and suspicion the evidence of a witness addicted to the use of morphine. *State v. Smith*..... 267

11. SAME. Upon sustaining objection to improper evidence it is not error for the court to indicate or mark the boundary between testimony that is competent and that which is not. *State v. Seablom*. 53

12. CRIMINAL LAW—RIGHTS OF ACCUSED — MEETING WITNESS — TRIAL. It is not error, in that accused did not meet the witnesses face to face, as required by Rem. Code, § 2306, that the stenographer read over the testimony of a witness for the benefit of a juror who fell asleep, and the accused was then given opportunity to ask the witness any questions whether previously covered or not. *State v. Keech* 533

13. CRIMINAL LAW—TRIAL—LIMITING ARGUMENT—DISCRETION. It is discretionary in a criminal action to limit the time for argument to the jury to three hours, and only abuse of discretion warrants interference therewith. *State v. Hewett*..... 52

Criminal Law—Continued.

14. CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL. A remark of the prosecuting attorney in argument that the accused "has not testified," does not warrant a reversal, where, upon objection, the court directed the jury to disregard it and instructed the jury that no inference of guilt should be drawn from accused's failure to testify. *State v. Raub*..... 214

15. SAME—TRIAL—INSTRUCTIONS. In a prosecution for illegal possession of whiskey, an instruction to consider statements of a witness not made on the witness stand only for the purpose of affecting his credibility is not error as calling attention to such witness, who had been tried and convicted for the same offense. *State v. Seablom* 53

16. SAME—TRIAL—POLLING JURY—IMPEACHING VERDICT. Where, upon polling the jury, a juror answered "either that or a hung jury," and upon being admonished, answered, "yes," the verdict should be received and cannot be impeached. *State v. Millroy*..... 193

17. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial for newly discovered evidence should not be granted where it is not shown that it could not have been discovered by reasonable diligence, and it would not likely change the result. *State v. Blackwood*..... 529

18. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—MATERIALITY. In a prosecution for murder, newly discovered evidence that an accessory had inquired the way to accused's room at 3 o'clock on the morning of the murder, did not go to an issue of fact and is not ground for a new trial, where both the accessory and accused and another witness testified that he called at the room two hours earlier. *State v. Hood*..... 489

19. CRIMINAL LAW — APPEAL — MISCONDUCT OF COUNSEL—RECORD. Error cannot be assigned upon improper argument of the prosecuting attorney, in the absence of a request for an instruction to the jury to disregard it. *State v. Johnson* 59

20. SAME—APPEAL—MISCONDUCT OF COUNSEL. Error cannot be assigned upon improper argument of counsel where no objection was made at the time or opportunity given the court to correct the error. *State v. Hood*..... 489

21. SAME—APPEAL—RECORD—AFFIDAVITS. Affidavits upon a motion for a new trial must be certified as part of the statement of facts, or they cannot be considered. *State v. Johnson*..... 59

22. SAME—TRIAL—IMPEACHING VERDICT. The verdict of a jury cannot be impeached by a juror's affidavit that she, unknown to the other jurors, arrived at her decision by chance. *State v. Millroy* 193

Criminal Law—Continued.

23. SAME—APPEAL—HARMLESS ERROR. In a prosecution for illegal possession of whiskey, it is harmless to instruct to convict if the liquors were by the accused purchased, "stole" or secured in any way, where it was admitted that what he had was stolen. *State v. Seablom* 53

Crops:

Lien on crops for rent, see LANDLORD AND TENANT, 9.

Cross-Appeals:

Necessity for, to review errors, see APPEAL AND ERROR, 21.

Cross-Examination:

See WITNESSES, 1, 3-5.

Crossings:

Injury to pedestrian from fall on slippery manhole at street crossing, see MUNICIPAL CORPORATIONS, 7, 8.

Accident at street railroad crossings, see STREET RAILROADS, 5.

Custody:

Of delinquent child, see INFANTS.

Customs and Usages:

As affecting construction of language in contract, see CONTRACTS, 4.

Damages:

To passenger through failure to keep waiting room open, see CARRIERS, 6-8.

For sinking pile-driver through collision, see COLLISION, 2.

Evidence to sustain action for, see CONSPIRACY.

For failure of cremation company to keep and deliver ashes of child, see DEAD BODIES.

For fraud, see FRAUD, 3.

Right of recovery over by city for damages recovered by person injured, see INDEMNITY.

Losses covered by indemnity policy, see INSURANCE, 2.

Eviction of tenant, see LANDLORD AND TENANT, 2.

For failure to put vendee in possession of land to cut and remove timber, see LOGS AND LOGGING, 2.

Torts by municipality, see MUNICIPAL CORPORATIONS, 4.

Prayer for general damages, see PLEADING, 1.

For breach of warranty, see SALES, 2.

As counterclaim in action by city to recover per centum of street railway earnings, see SET-OFF AND COUNTERCLAIM, 2.

1. DAMAGES — MEASURE OF DAMAGES — BREACH OF CONTRACT. The measure of damages for breach of a contract to install heating appliances in houses is the actual outlay of the owners made neces-

Damages—Continued.

sary by the failure of the heating system, which was inadequate for the purpose designed, rather than the depreciation in the value of the real property on account of the misrepresentations. *Electric Sales Corporation v. Radford* 130

2. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $832 for damages through catching cold is excessive, where the evidence showed nothing beyond the usual discomfort usually caused by such condition. *Davenport v. Chicago, Milwaukee & St. Paul R. Co.* 645

Dead Bodies:

1. DEAD BODIES—NEGLIGENCE—DAMAGES—MENTAL SUFFERING. Since there can be no recovery for damages arising from mental anguish as a result of negligence when not accompanied by physical injury, there can be no recovery therefor against a cremation company for negligence in failing to keep and deliver the ashes of a child as provided in the parent's contract for its cremation. *Kneass v. Cremation Society of Washington* 521

Debt:

Community or separate character of, see HUSBAND AND WIFE, 1-3, 5, 6.

Debtor and Creditor:

See FRAUDULENT CONVEYANCES.

Decedents:

Estates, see EXECUTORS AND ADMINISTRATORS.

Deceit:

See FRAUD.

Decision:

On appeal, see APPEAL AND ERROR, 35-38.

Declarations:

Of grantor as impeaching title of grantee, see FRAUDULENT CONVEYANCES, 4.

Deeds:

Sufficiency of deed as color of title, see ADVERSE POSSESSION, 1.
Authority of officers to execute, see BANKS AND BANKING, 2.
Cancellation, see CANCELLATION OF INSTRUMENTS.
In fraud of creditors, see FRAUDULENT CONVEYANCES.
Acceptance of deed subject to mortgage as tolling statute, see LIMITATION OF ACTIONS, 2.
Authority of agent to deliver, see PRINCIPAL AND AGENT, 1.

Deeds—Continued.

1. DEEDS—VALIDITY—FICTITIOUS NAME. A deed taken in a fictitious name, with subsequent transfer in such name, passes title and the instruments are valid in the hands of an innocent holder. *Farmers & Mechanics Bank v. Western Loan & Building Co*..... 349

Default:

By vendee, waiver of, see VENDOR AND PURCHASER, 2.

Defect:

In city street crossing, see MUNICIPAL CORPORATIONS, 7, 8.

Deficiency:

Judgment against husband in action to foreclose mortgage as community debt, see HUSBAND AND WIFE, 6.

Delegation:

Of legislative powers, see CONSTITUTIONAL LAW, 1.
Of master's duty to servant, see MASTER AND SERVANT, 5.

Delinquent Child:

Custody and control of, see INFANTS.

Delivery:

Registration and delivery of school warrants, see SCHOOLS AND SCHOOL DISTRICTS, 1.

Demand:

For inspection of books or papers, see CORPORATIONS, 4.

Dentists:

Sufficiency of information charging practicing dentistry without license, see INDICTMENT AND INFORMATION, 2.
Practicing without license, see PHYSICIANS AND SURGEONS.

Depositions:

1. DEPOSITIONS—EXPERTS—NUMBER OF WITNESSES — DISCRETION. It is within the discretion of the trial court to limit the number of medical experts whose depositions were to be taken to prove the value of medical services. *Terrill v. Fotheringham*..... 34

Depots:

Regulation by company of time for keeping waiting room open, see CARRIERS, 6, 7.

Description:

Error in describing property in prior mortgage, see MECHANICS' LIENS, 2.

Diligence:

Affecting right to continuance, see CONTINUANCE.
Dismissal of appeal for lack of, see CRIMINAL LAW, 3.
Affecting right to new trial, see CRIMINAL LAW, 17.

Directing Verdict:

In civil actions, see TRIAL, 4.

Discharge:

See COMPROMISE AND SETTLEMENT.
From liability against maker of note, see BILLS AND NOTES, 1.
From liability as surety, see PRINCIPAL AND SURETY.

Discretion of Court:

Review in civil actions, see APPEAL AND ERROR, 23, 24.
To grant continuance, see CONTINUANCE.
To limit time for argument to jury, see CRIMINAL LAW, 13.
To limit number of expert witnesses to make depositions, see DEPOSITIONS.
Submission of issues to trial by jury, see JURY.
To allow amendment of pleading, see PLEADING, 3.
Reopening case for further evidence, see TRIAL, 1.

Discrimination:

By carrier, see CARRIERS, 4.
In imposing tax upon use of streets by railway, see STREET RAILROADS, 3.

Dismissal and Nonsuit:

Dismissal of appeal, see APPEAL AND ERROR, 16, 18.
Contract for dismissal of action for appointment of receiver of corporation as violation of public policy, see CONTRACTS, 3.
Criminal appeals, see CRIMINAL LAW, 3.

Disorderly House:

Abatement as public nuisance, see NUISANCE, 2, 3.

District and Prosecuting Attorneys:

Authority of deputy to verify information, see INDICTMENT AND INFORMATION, 1.

Districts:

Drainage districts, see DRAINS.

Ditches:

See DRAINS.

Diversion:

Wrongful diversion of local improvement fund, see MUNICIPAL CORPORATIONS, 11.

Dividends:

On corporate stock, see CORPORATIONS, 2, 3.

Divorce:

Review of order for payment of alimony, in absence of evidence on appeal, see APPEAL AND ERROR, 8.

1. DIVORCE—ALIMONY—DIVISION OF PROPERTY. In an action for divorce, an award of $5,660 as permanent alimony and in lieu of dower rights is inadequate, and will be increased to $10,000, where it appears that defendant had separate property of the value of sixty to eighty thousand dollars, readily convertible, and a large income from mining interests. *Dober v. Dober*..... 283

2. DIVORCE — ALIMONY — PROPERTY SETTLEMENT — POWER OF COURT. Under Rem. Code, § 988, the court may make an order for alimony for the welfare of the children, even though the parties made a property settlement prior to the divorce. *Miller v. Miller*..... 569

3. DIVORCE—ALIMONY—ENFORCEMENT—CONTEMPT PROCEEDING — TITLE —PARTIES. A proceeding to enforce a decree for alimony by means of notice and commitment for contempt in case of default, is not an independent contempt proceeding to be prosecuted in the name of the state, but is properly entitled in the divorce case. *Miller v. Miller* 569

Doctors:

Practicing dentistry without license, see PHYSICIANS AND SURGEONS.

Domicile:

Of parties as affecting venue, see VENUE.

Drains:

Provision for special assessment without review by courts as denial of due process of law, see CONSTITUTIONAL LAW, 2.

1. DRAINS—ESTABLISHMENT — PROCEEDINGS — OBJECTIONS — WAIVER. Where no objections were made to the order of county commissioners establishing a drainage district and no appeal was taken from an order finding that the plan of drainage was impracticable and assessing the costs of the proceeding against the district, as directed by Rem. Code, § 4150, providing for dissolution of the district, all objections to the legality of the district are waived, and petitioners and owners cannot question the same in *quo warranto* for the purpose of evading the payment of the costs. *State ex rel. O'Phelan v. Lundquist* 339

2. DRAINS — ASSESSMENT — BENEFITS. An assessment for a drain against railroad right of way cannot be sustained in a sum greater than that upon other property on the theory that, by drying up the country and protecting it from floods, it makes the roads in the vicinity more accessible and adds to the business of the railroad;

Drains—Continued.

since that is a general and not a special benefit, and a greater burden on one property than upon others requires some different or special benefit to such property. *Oregon-Washington R. & Nav. Co. v. Board of Commissioners of Yakima County*..... 480

3. SAME—ASSESSMENT—BENEFITS. An arbitrary drainage assessment of a railroad right of way in a disproportionate sum cannot be sustained because the property was benefited to the extent of the assessment, which was to be apportioned ratably and equitably. *Oregon-Washington R. & Nav. Co. v. Board of Commissioners of Yakima County* 480

Druggists:

Unlawful sale of liquor, see INTOXICATING LIQUORS, 3.

Due Process of Law:

See CONSTITUTIONAL LAW, 2.

Duress:

In obtaining confession, see CRIMINAL LAW, 6, 7.

Ejection:

Of passengers from waiting room, see CARRIERS, 8.

Election of Remedies:

By vendor in conditional sales contract, see SALES, 5.

Electricity:

Contracts with city for lighting, see MUNICIPAL CORPORATIONS, 1.

Elevators:

Master's liability to servant for injuries from elevators, see MASTER AND SERVANT, 5.

Employees:

See MASTER AND SERVANT.

Employers' Liability Act:

See MASTER AND SERVANT, 2, 3.

Equity:

See CANCELLATION OF INSTRUMENTS.
Equitable estoppel, see ESTOPPEL.
Application of insurance money on enforcement of contract to convey property leased with option to purchase, see INSURANCE, 3, 4.
Right to jury trial in equitable action, see JURY.
Priority of mechanics' lien over erroneous mortgage, see MECHANICS' LIENS, 2.

Establishment:

Of drains, see DRAINS.
Of highways, see HIGHWAYS.

Estates:

Estate of deceased persons, see EXECUTORS AND ADMINISTRATORS.

Estoppel:

Right to raise question for first time on appeal, see APPEAL AND ERROR, 4-7.
Right to assert title by grantee, see FRAUDULENT CONVEYANCES, 3.
By judgment, see JUDGMENT.

1. ESTOPPEL—CONTRACTS. A tenant who agreed to abrogate a lease so that the building may be torn down, is estopped to assert want of consideration, after the contractor acted on his promise and had proceeded to take down the building. *Patterson v. Jordan*..... 200

2. ESTOPPEL—ASSERTION OF CONTRARY CLAIMS—CHANGE OF SITUATION. A community creditor, who, in actions to set aside fraudulent conveyances, claimed the property conveyed was the separate property of the husband, is not estopped from subsequently asserting that it was community roperty in a suit to enjoin his execution sale, where he was nonsuited, recovering nothing by his first actions, in which the character of the property was immaterial, since the rights of the parties were not changed or affected. *Mineah v. Duffy*... 547

Eviction:

Of tenant, see LANDLORD AND TENANT, 2, 4, 5.

Evidence:

Hostile character of possession, see ADVERSE POSSESSION, 2.
Incorporation of in record on appeal, see APPEAL AND ERROR, 8-12.
Prejudice from error on appeal, see APPEAL AND ERROR, 32, 33.
Authority of attorney to begin suit, see ATTORNEY AND CLIENT, 1.
For attorney's fee, see ATTORNEY AND CLIENT, 2, 3.
Payment of note, see BILLS AND NOTES, 2.
In action for broker's compensation, see BROKERS, 1, 3.
Warranting relief from franchise provision requiring issuance of commutation tickets, see CARRIERS, 2.
In action by passenger for damages through failure to keep waiting room open, see CARRIERS, 7.
Binding effect of compromise agreement, see COMPROMISE AND SETTLEMENT.
Of damages for conspiracy to injure business, see CONSPIRACY.
Construction of contract, see CONTRACTS, 4.
In action on contract, see CONTRACTS, 6.
Motive for crime, see CRIMINAL LAW, 4.
Of offenses, see CRIMINAL LAW, 5.
Confession of accused, see CRIMINAL LAW, 6, 7.

Evidence—Continued.

Newly discovered evidence as ground for new trial, see CRIMINAL LAW, 17, 18.

Depositions, see DEPOSITIONS.

For allowance of attorney's fees, see EXECUTORS AND ADMINISTRATORS, 1.

For obtaining money under false pretenses, see FALSE PRETENSES, 2.

For fraud, see FRAUD, 1, 2.

Of fraudulent conveyances, see FRAUDULENT CONVEYANCES, 5.

In prosecution for violation of liquor laws, see INTOXICATING LIQUORS, 1, 2, 4, 5.

Eviction of tenant, see LANDLORD AND TENANT, 4, 5.

On fixing attorney's fees in action for rent, see LANDLORD AND TENANT, 8.

Ownership of stolen property, see LARCENY, 1.

Larceny of live stock, sufficiency, see LARCENY, 2.

In action on contract to purchase timber cut and removed, see LOGS AND LOGGING, 3, 4.

For injuries to servant, see MASTER AND SERVANT, 11.

Notice of prior mortgage, see MECHANICS' LIENS, 1.

Wrongful diversion of local improvement fund, see MUNICIPAL CORPORATIONS, 11.

In action for loss of property by fire, see NEGLIGENCE.

Existence of partnership, see PARTNERSHIP, 2.

To sustain conviction for practicing dentistry without license, see PHYSICIANS AND SURGEONS.

Authority of agent, see PRINCIPAL AND AGENT.

Possession of money by accused, see ROBBERY.

To establish contract for sale of goods, see SALES, 1.

Questions of fact for jury, see TRIAL, 5.

Competency, attendance, credibility and examination of witnesses, see WITNESSES.

1. EVIDENCE—JUDICIAL NOTICE—HEALTH LAWS. The courts may take notice that the nature of contagious diseases are factors to be considered in the matter of quarantine and to be left to the judgment of medical experts. *State ex rel. McBride v. Superior Court*.... 409

2. EVIDENCE—BEST AND SECONDARY EVIDENCE—ISSUANCE OF CORPORATE STOCK. In an action on contract, oral evidence that laborers had been paid by the issuance of corporate stock, is properly excluded on the ground that the books of the company are the best evidence. *Seid Chee v. Sanitary Fish Co*..... 345

3. EVIDENCE—EXPERT OPINIONS—QUALIFICATIONS OF WITNESS. An expert as to the cost of logging and market value of logs is not disqualified because he had never been on the land, where he answered properly framed hypothetical questions based upon the proof. *Sanders v. Pinney*..... 162

4. EVIDENCE—EXPERTS — VALUE OF SERVICES—EVIDENCE — ADMISSIBILITY. Upon an issue as to the value of medical sevices performed

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in San Francisco, it is admissible for medical experts of Seattle to testify as to the care and attention required in a disease known of all physicians. *Terrill v. Fotheringham*..... 34

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Of witnesses in general, see WITNESSES.

Exceptions, Bill of:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 6, 7.

Excessive Damages:

See DAMAGES, 2.
Review of verdict, see APPEAL AND ERROR, 26.

Exchange of Property:

Rescission of trade of properties, see CANCELLATION OF INSTRUMENTS.
Misrepresentations in exchange of land, see FRAUD, 3.
Right to jury trial in action to rescind exchange of land, see JURY.
Authority of agent to deliver deeds for, see PRINCIPAL AND AGENT, 1.

1. EXCHANGE OF PROPERTIES — JUDGMENT — DECREE. Upon sustaining an exchange of properties, and allowing defendant's claim for one-third of the crop taken from the land obtained by him, as per agreement, it is error to decree the same a lien upon the land conveyed to plaintiff, other than as the same becomes a lien upon entry of a money judgment therefor. *Rinne v. Wilson*..... 169

Execution:

Against community personalty for separate debt of husband, see HUSBAND AND WIFE, 5.

1. EXECUTION — WRONGFUL SEIZURE OF PROPERTY — RIGHTS OF THIRD PERSONS—CLAIMS AND DELIVERY. The vendor of property in a conditional sales contract who was not made a party to abatement proceedings under the "red light" law may replevin the same without making claim to the sheriff as for property wrongfully levied upon under Rem. Code, § 573; since the same is not mandatory, and merely gives the claimant to property levied upon a choice of remedies. *Simon Piano Co. v. Fairfield*..... 206

Executors and Administrators:

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTING—ATTORNEY'S FEES—EVIDENCE. Six thousand dollars is reasonable compensation for an attorney for an executrix of a nonintervention will, where the estate was appraised at over $400,000, there were over 400 pieces of real estate involved, he probated the will and attended to all the usual duties, and there were diversified interests involving a great deal of detail, and all services were diligently attended to with reasonable success. *Snook v. Kennedy*..... 390

Executors and Administrators—Continued.

2. EXECUTORS AND ADMINISTRATORS — ACTIONS — ATTORNEY'S FEES. Where the executrix of a nonintervention will brought action for an accounting, making her attorney a party defendant, who was alleged to have an undetermined claim against the estate, she cannot assign error in that the judgment fixed the amount of his fees. *Snook v. Kennedy* 390

Exhibits:

As part of record on appeal, see APPEAL AND ERROR, 12.

Expert Testimony:

Limiting number of expert witnesses to make deposition, see DEPOSITIONS.

Testimony in civil actions, see EVIDENCE, 3, 4.

Extra Hazardous Work:

Employees engaged in, see MASTER AND SERVANT, 1.

False Pretenses:

1. FALSE PRETENSES—INFORMATION—SUFFICIENCY. An information for obtaining money under false pretenses is sufficient where it shows that the money was secured by falsely representing that a tract of forty acres in S. county was subject to homestead entry and that accused could locate the prosecuting witnesses thereon, in view of Rem. Code, §§ 2065, 2066, requiring only a statement that may be understood by a person of common understanding which is insufficient only when it tends to prejudice the substantial rights of the defendant. *State v. Millroy*..... 193

2. SAME—EVIDENCE—SUFFICIENCY. A conviction of obtaining money under false pretenses is sustained where it appears that accused obtained $300 by falsely representing that land pointed out by him was subject to homestead entry, and by inducing the prosecuting witness to enter a contest and make an entry upon other land. *State v. Millroy*..... 193

Family Expenses:

A charge against community property, see HUSBAND AND WIFE, 1, 2.

Fares:

Regulation of rates for passenger fares, see CARRIERS, 1-3.

Regulation of street railway rates, see STREET RAILROADS, 2.

Fees:

Attorney, see ATTORNEY AND CLIENT, 2, 3.

Allowance of attorney's fees in action by county to interplead claims against contractor's bond, see COUNTIES, 2.

Of attorneys in administration of estates, see EXECUTORS AND ADMINISTRATORS.

Attorney's fees in action for rent, see LANDLORD AND TENANT, 8.

Allowance of attorney's fees to receiver, see RECEIVERS, 2.

Fellow Servants:

See MASTER AND SERVANT, 5, 6.

Filing:

Statement of facts in lower court, see APPEAL AND ERROR, 13.
Of claim against contractor's bond, necessity, see GUARANTY, 3.
Notice of lien on crops for rent, see LANDLORD AND TENANT, 9.
Claim against county as tolling statute, see LIMITATION OF ACTIONS, 3.

Final Judgment:

Appealability, see APPEAL AND ERROR, 2, 3.

Findings:

Review on appeal or writ of error, see APPEAL AND ERROR, 25, 27, 28.

Fire Insurance:

See INSURANCE, 3. 4.

Fires:

Care required to prevent spread of fire, see NEGLIGENCE.
Collection of funds for fire protection, see STATES.

Fish:

1. FISH—OFFENSES—UNLAWFUL FISHING—FORFEITURE OF PROPERTY. Under Rem. Code, §§ 5150-40, 5150-41, providing that all appliances used in illegal fishing shall be abated as nuisances, shall be subject to execution for payment of fines imposed upon the owners, and may be seized and forfeited to the state, boats and appliances so used may be seized and confiscated although the persons tried and convicted of illegal fishing were not the owners, and the owners intervened and showed that they had not authorized the use of the boats in American waters, and were innocent of wrongdoing. *State v. Umaki* 232

Foreclosure:

Of mechanics' lien, see MECHANICS' LIENS, 1, 2.
Of mortgage, see MORTGAGES, 3, 4.

Forfeiture:

Of appliances used in unlawful fishing, see FISH.
Of contract for sale of real estate, see VENDOR AND PURCHASER, 2, 3.

Former Adjudication:

See JUDGMENT.

Franchise:

Relief through public service commission from provision relating to issuance and price of commutation tickets, see CARRIERS, 1, 2.
For street railway, see STREET RAILROADS, 1-4.

Fraud:

See FALSE PRETENSES.

As affecting compromise agreement, see COMPROMISE AND SETTLEMENT.

Conveyances in fraud of creditors, see FRAUDULENT CONVEYANCES.

Pleading newly discovered fraud to vacate former judgments, see JUDGMENT, 3.

Of partner in obtaining title to mining claim, see MINES AND MINERALS.

As ground for rescission, see VENDOR AND PURCHASER, 6.

1. FRAUD — MEANS OF KNOWLEDGE — EVIDENCE — SUFFICIENCY. The evidence does not sustain an action for deceit in a sale of an acre and a half of land, in regard to the location of a highway and ravine, where the vendee had purchased and spent two summers upon adjoining land, knew the location of the two tracts and was perfectly familiar with the surroundings, and the highway was slashed and plainly visible, and there was no evidence of misrepresentations as to the ravine. *Walquist v. Johnson*..... 30

2. FRAUD—MISREPRESENTATIONS—ACTION FOR DAMAGES — EVIDENCE—SUFFICIENCY. In an action for damages for fraudulent representations, findings for defendant are sustained where there was evidence that the representations were made in good faith, and were not relied on by the plaintiff, who made his own investigation. *Williams v. Moore* 560

3. FRAUD—DECEIT — EXCHANGE OF PROPERTY — MEASURE OF DAMAGES. The measure of damages for deceit in misrepresentating the value of mortgage securities, traded for plaintiff's property, is the difference between the actual value of the securities and their value as represented. *Parkhurst v. Elliott*..... 89

Frauds, Statute of:

1. FRAUDS, STATUTE OF—LEASE—INDIVISIBLE CONTRACT. Where a lease for a term of years is void under the statute of frauds for want of acknowledgment, it cannot be enforced as to obligations to be performed upon the expiration of the term, where its several stipulations are so interdependent that the parties contracted with a view to its performance as a whole. *Eriksen v. Manufacturers Distributing Co.* 159

2. FRAUDS, STATUTE OF — BROKER'S COMMISSIONS — CONTRACT TO PAY FOR PAST SERVICES. A written agreement that a certain sum was due for a broker's commission in case of consummation of the sale, entered into ten days after the sale, was, in effect, an agreement to pay for past services, and so is not within Rem. Code, § 5289, which requires a broker's written contract for commissions to contain a description of the property to be sold. *Henneberg v. Cook*..... 685

Frauds, Statute of—Continued.

3. FRAUDS, STATUTE OF—CONVEYANCE OF REAL ESTATE—OIL AND GAS LEASE. An oil and gas "lease" permitting the licensee to search and dig for oil and gas and appropriate the same upon payment of a royalty, creates only an incorporeal hereditament or chattel interest, in no manner proscribed by the rules against conveyances or incumbrances of real estate except by writing; hence the real beneficiaries may be shown by parol. *Walla Walla Oil, Gas & Pipe Line Co. v. Vallentine* 359

4. FRAUDS, STATUTE OF—ORAL AGREEMENT TO RESCIND SALE OF LAND —EXECUTED CONTRACT. An oral rescission of a contract for the sale of lands is fully executed and taken out of the ban of the statute of frauds, where the vendee, in default, surrendered possession to the vendors, who returned the notes for the purchase price and maintained hostile possession. *McKay v. Meyer*..... 270

Fraudulent Conveyances:

Action by trustee in bankruptcy to set aside, see BANKRUPTCY, 3.

1. FRAUDULENT CONVEYANCES—TRANSACTIONS BETWEEN HUSBAND AND WIFE—SUBSEQUENT CREDITORS. Deeds made by husband to wife at a time when he was free from debt and not contemplating engaging in a hazardous occupation, for the purpose of settling advances made to him by the wife and on full consideration, are not fraudulent as to subsequent creditors. *Browitt v. Fiegle*..... 334

2. SAME—TRANSACTIONS BETWEEN HUSBAND AND WIFE—GOOD FAITH —BURDEN OF PROOF. Where the good faith of a transaction between husband and wife is assailed, the burden of proof is upon the party asserting the good faith, under Rem. Code, § 5292. *Browitt v. Fiegle* 334

3. SAME—FAILURE TO RECORD DEED—EFFECT. If a wife's failure to record her deed from her husband is not due to bad faith or to a fraudulent intent, she is not estopped from asserting title against her husband's creditors. *Browitt v. Fiegle*..... 334

4. SAME—TITLE OF GRANTEE—IMPEACHMENT BY DECLARATIONS OF GRANTOR. A grantee's title cannot be impeached by declarations of the grantor made subsequent to the transfer, showing the grantor's fraudulent intent as to his creditors. *Browitt v. Fiegle*..... 334

5. FRAUDULENT CONVEYANCES — TRANSACTIONS BETWEEN RELATIVES — EVIDENCE—SUFFICIENCY. The mere fact that conveyances were made from mother to sons in consideration of debts due from her to them, while she was indebted, do not make them fraudulent as to creditors, and they may be upheld if, critically examined, the evidence supports findings that they were on sufficient consideration. *Clancy v. Steinke* 538

Funds:

Local improvement fund, see MUNICIPAL CORPORATIONS, 11.
State funds, see STATES.

Gifts:

Charitable bequests, see PERPETUITIES.

Good Faith:

In execution of conveyance, see FRAUDULENT CONVEYANCES, 2.
In prescribing whiskey for patient, see INTOXICATING LIQUORS, 4.

Governmental Functions:

Acts of city in governmental capacity, see MUNICIPAL CORPORATIONS, 4.

Guaranty:

See INDEMNITY.
Contracts of suretyship, see PRINCIPAL AND SURETY.

1. GUARANTY—CONTRACTS—LIABILITY TO THIRD PERSONS — WANT OF PRIVITY. While the seller of corporate stock, who retained a portion of the assets and agreed with the buyer and the corporation to pay all the debts of the corporation, was concededly liable directly to the creditors, a guaranty contract whereby a third person agreed with the corporation and the buyer to guarantee the seller's performance of his agreement does not render the guarantor liable to the creditors, although they are indirectly interested in its performance; since the guaranty was intended only for the benefit of the promisees, and there was no privity with creditors, and the doctrine of liability without privity is not to be extended to new and doubtful cases. *Horstmann Co. v. Waterman*..... 18

2. GUARANTY—CONTRACTOR'S BOND — LOAN TO CONTRACTOR — CONSENT OF SURETY—LIABILITY. A letter from a contractor's surety consenting to an assignment of bonds, to be held "as collateral security only for a loan" to the contractor, is not a guaranty of payment of the loan on failure of the security through default of the principal. *United States Fidelity & Guaranty Co. v. American Savings Bank & Trust Co.* 304

3. GUARANTY — OF PAYMENT — CONTRACT — CONSTRUCTION. A letter from the surety upon a contractor's bond requesting a bank to make a loan to the contractor which was agreed should be a claim against the bond in case of loss on the job, is a contract of guaranty upon which the surety was directly liable without the filing of a claim against the bond. *King County v. Guardian Casualty & Guaranty Co.* 509

Habeas Corpus:

Review in habeas corpus to produce person detained in quarantine, see HEALTH, 5.
To inquire into legality of custody of delinquent child, see INFANTS, 1.

1. HABEAS CORPUS—DEFENSES—QUARANTINE. It is no defense to habeas corpus proceedings to produce a person detained in quaran-

Habeas Corpus—Continued.

tine by authority of the state board of health, that the commissioner cannot break quarantine without incurring the penalties of the law, as the order of the court would be a complete protection. *State ex rel. McBride v. Superior Court*..... 409

Harmless Error:

In criminal prosecutions, see CRIMINAL LAW, 23.
In civil actions, see APPEAL AND ERROR, 29-34.

Health:

Delegation of legislative power to health boards, see CONSTITUTIONAL LAW, 1.
Judicial notice of matters relating to quarantine, see EVIDENCE, 1.
Habeas corpus to produce person detained in quarantine, see HABEAS CORPUS.

1. HEALTH—HEALTH ORDINANCES—POWER OF CITY. Notwithstanding Const., art. 20, § 1, provides that the state board of health be created and makes no provision for city boards, a city has power to pass health ordinances and to create the office of health commissioner, when not in conflict with the general law. *State ex rel. McBride v. Superior Court*..... 409

2. HEALTH—STATUTES—CONSTRUCTION. Health and quarantine laws are to be liberally construed. *State ex rel. McBride v. Superior Court* 409

3. HEALTH—QUARANTINE—VALIDITY. The power of summary quarantine is not to be denied because the authority may be abused or the law maladministered. *State ex rel. McBride v. Superior Court* 409

4. SAME—HEALTH ORDINANCES—VALIDITY. Seattle ordinances, Nos. 15,957 and 32,444, providing for quarantine of persons afflicted with contagious diseases, with the right of appeal to the state board of health, does not conflict with general laws; for if sole power is conferred upon the state board, the same is preserved by providing the right of appeal. *State ex rel. McBride v. Superior Court*..... 409

5. HEALTH — QUARANTINE — POLICE POWER — AUTHORITY OF BOARDS—REVIEW BY COURTS—HABEAS CORPUS. The legislature, in the exercise of the police power, has power, by Rem. Code, § 5404 *et seq.*, to create a board of health and to provide that its decisions as to the detention of persons in quarantine shall be final and conclusive; and the courts will not, in habeas corpus proceedings, inquire into the reasonableness of the act, where the legislature makes proper classifications and provides the means and methods for carrying out an ordinance sounding in the police power, the court not going beyond the query whether the subject-matter of the act is within the range of its authority. *State ex rel. McBride v. Superior Court*.. 409

Highways:

As incumbrance, see COVENANTS.

Limitation of action for damage to property from change of grade, see LIMITATION OF ACTIONS, 1.

Defects or obstructions in city streets, see MUNICIPAL CORPORATIONS, 7, 8.

1. HIGHWAYS—ESTABLISHMENT—PETITION— SIGNERS — SUFFICIENCY— STATUTES. There is no constitutional objection against the initiation of a permanent highway improvement by a petition signed by the owners of two-thirds of the lineal feet of the lands fronting upon the highway, as authorized by Rem. Code, § 5879-2, and it is not necessary that the petition be signed by two-thirds of the owners of property to be included within the assessment district. *Kaufman v. McMillan* 690

2. HIGHWAYS—STATE CONTRACTS—STATUTES—LIABILITY ON CONTRACT MADE BY COUNTY. Under Rem. Code, § 5879-2 *et seq.*, outlining a general system for the improvement of permanent highways, to be contracted for by the boards of county commissioners on approval of the state highway commissioner, and to be paid for by the state from the state highway fund, after certificate by the county boards, the state is a necessary party defendant in an action to compel payment of a claim duly certified by the county officials to the state highway commissioner; since the contract with the county was made with reference to the act, and the state, not the county, was liable thereon. *Willapa Harbor Sand & Gravel Co. v. Pacific County* 309

3. SAME—ASSESSMENT—METHODS—BENEFITS—ZONE SYSTEM. An assessment of lands not shown to be in excess of the benefits received, is not *ipso facto* invalid because made by area or a zone system, under Rem. Code, § 5879-10 fixing three zones on each side of a permanent highway improvement, and specifying the proportion each shall bear to the cost assessed to the property in the district, and providing that each tract or parcel of land in any zone shall be assessed according to the relation of the area thereof to the total area within the zone. *Kaufman v. McMillan*..... 690

4. SAME—ASSESSMENT — BENEFITS — FAILURE TO OBJECT. Property owners who did not avail themselves of the opportunity to be heard upon the question of benefits from a permanent highway, assessed under Rem. Code, § 5879-1 *et seq.*, and whose lands are not assessed in excess of benefits, cannot maintain an action to enjoin assessment upon the ground that the scope of the hearing on the assessment roll was unduly limited by the statute. *Kaufman v. McMillan*... 690

Husband and Wife:

Divorce and judicial separation, see DIVORCE.

Estoppel of creditor to assert community character of property, see ESTOPPEL, 2.

Husband and Wife—Continued.

Conveyances fraudulent as to husband's creditors, see FRAUDULENT CONVEYANCES, 1-4.

1. HUSBAND AND WIFE — SEPARATE PROPERTY — WIFE'S CONTRACTS — FAMILY EXPENSES—STATUTES. Where a wife purchased a piano on her own behalf after her husband had refused to make or consent to the purchase, expecting to pay for the same out of her separate estate, it is not chargeable against the community or the separate property of the husband as "expenses of the family and the education of the children," within Rem. Code, § 5931, in view of other provisions of the same act, giving the wife the right to deal with her own separate property, and providing that the custody and control of the community personal property shall be in the husband, whose separate property shall not be liable for the wife's separate debts. *Bush & Lane Piano Co. v. Woodard*..... 612

2. SAME — SEPARATE PROPERTY — FAMILY EXPENSES — LIABILITY—ACTIONS—TRIAL. In such a case, whether the piano was a family expense was a question of law for the court and not for the jury, and the husband was not liable unless he ratified the sale. *Bush & Lane Piano Co. v. Woodard*..... 612

3. SAME—ACTIONS—ISSUES AND PROOF — ADMISSIONS — INSTRUCTIONS. In an action against a husband and wife upon a promissory note alleged to be given as the sale price of a piano, which was admittedly purchased by the wife for her separate use and not paid for, it is error to instruct that her failure to sign the note warranted a judgment in favor of both defendants, on the theory that the complaint declared upon a note, where the issues were broadened to include her liability on her separate contract to buy the piano for which the note was alleged to have been given. *Bush & Lane Piano Co. v. Woodard* 612

4. HUSBAND AND WIFE—COMMUNITY PROPERTY—CONTROL BY HUSBAND INSANITY OF WIFE. A husband, appointed as guardian of his insane wife, may convert community realty into personalty and take his one-half of it without accounting to the probate court; as the management and control of community realty remains in the husband notwithstanding the insanity of the wife and appointment of a guardian. *Morrison v. Patrick*..... 442

5. HUSBAND AND WIFE—COMMUNITY PERSONALTY—LIABILITY FOR SEPARATE DEBTS... Under Rem. Code, § 5917, giving the husband management and control of the community personal property, with like power of disposition as of his separate property, the community personalty cannot be levied upon to satisfy the separate debt of the husband. *Olive Co. v. Meek*..... 467

6. HUSBAND AND WIFE — COMMUNITY DEBT — ACTIONS — JUDGMENT — CONSTRUCTION. Where the complaint in an action to foreclose a mortgage alleged that it was a community debt and the same was

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admitted by the answers, a deficiency judgment against the husband, who alone signed the note, is not an adjudication that the debt was his separate debt, there being no provision that it was to be executed against his separate property; and community property was subject to it, in view of the whole record and the rule that a judgment against the husband alone is prima facie a community liability. *Mineah v. Duffy* 547

Impeachment:

Of grantee's title by declarations of grantor showing fraudulent intent, see FRAUDULENT CONVEYANCES, 4.

Of verdict by testimony or affidavit of jurors, see CRIMINAL LAW, 16, 22.

Of witnesses, see WITNESSES, 2, 3, 6, 7.

Implied Repeal:

Of statute giving right of action against county for tort, see STATUTES.

Improvements:

Public improvements, see MUNICIPAL CORPORATIONS, 2.

Incumbrances:

Highway as incumbrance, see COVENANTS.

Indemnity:

See GUARANTY.

Contracts of suretyship, see PRINCIPAL AND SURETY.

1. INDEMNITY—PERSONAL INJURIES—CONTRACT TO SAVE HARMLESS—CONTRIBUTING TO INJURY—JOINT TORT FEASORS. A city cannot recover over from a railroad company, bound to save the city harmless from damages caused by the construction of a tunnel, on account of a judgment for personal injuries sustained on a defective sidewalk, alleged to be caused by the construction of the tunnel, if the city contributed to the injury by faulty construction of the sidewalk or by knowingly maintaining a defect in a city street, since either would be an independent act of negligence by the city, making it a joint tort feasor and not entitled to recover from the railroad company. *Seattle v. Great Northern R. Co.* 294

Indemnity Insurance:

See INSURANCE, 2.

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Indictment and Information:

See FALSE PRETENSES, 1.

1. INDICTMENT AND INFORMATION—VERIFICATION—DEPUTIES. An information may be verified by the deputy prosecuting attorney before the deputy county clerk. *State v. Hewett*..... 52

2. INDICTMENT AND INFORMATION—SUFFICIENCY—PRACTICING DENTISTRY WITHOUT LICENSE. An information for practicing dentistry without a license, in the language of the statute, is sufficient without alleging the nature of the disease or lesion or the treatment. *State v. Austin*..... 63

Industrial Insurance:

See MASTER AND SERVANT, 1, 4.

Infants:

1. INFANTS — DELINQUENCY — CUSTODY — JURISDICTION OF COURTS — HABEAS CORPUS. A superior court has power to commit a delinquent child to the custody of an institution without the county and still retain exclusive jurisdiction over the child; in view of Rem. Code, §§ 1987-1, 1987-2, and 1987-5, which makes a delinquent the ward of the superior court, and Id., §§ 1987-8 to 1987-10, conferring continuing jurisdiction upon a superior court to make any order for the custody and control of a delinquent minor necessary for its welfare; hence habeas corpus may issue from such court to inquire into the legality of such custody. *In re Chartrand*..... 36

2. INFANTS—CUSTODY OF DELINQUENTS—POWERS OF COURT—MODIFICATION OF ORDER. A conditional order for the custody of a delinquent child, reserving control of the child in the court for one year, may be modified upon reasonable notice within the year, without the necessity of summons or notice required by statutes relative to the modification of judgments. *State ex rel. De Bit v. Superior Court* 183

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Criminal accusation, see INDICTMENT AND INFORMATION.

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Enjoining assessment for highway improvement, see HIGHWAYS, 4.
Illegal sale by city of product of asphalt plant, see MUNICIPAL CORPORATIONS, 13.
Abatement of nuisance, see NUISANCE.

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Estoppel, see ESTOPPEL.

Insane Persons:

Management and control of community property by husband after appointment as guardian of insane wife, see HUSBAND AND WIFE, 4.

Insolvency:

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Review as dependent on exception in lower court, see APPEAL AND ERROR, 7.

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In criminal prosecutions, see CRIMINAL LAW, 15, 23.

In civil actions, see TRIAL, 6.

Insults:

Liability to passenger for acts of employees, see CARRIERS, 8.

Insurance:

1. INSURANCE—COMPANIES—STOCKHOLDER'S MEETINGS—PROXY VOTING—LIMITATIONS—AUTHORITY OF TRUSTEES—STATUTES. Under Rem. Code, § 6059-63, providing that the trustees of an insurance company may vote to permit an officer of the corporation to vote proxies at the annual stockholders' meeting, a resolution of the trustees permitting such voting, but limiting the authority to special matters and attempting to designate the persons to be voted for as trustees, is a valid authority for proxy voting by an officer, but the attempted restrictions thereon are void as beyond the authority of the trustees, and contrary to public policy and the intent of the legislature. *State ex rel. Lally v. Cadigan*..... 254

2. INSURANCE—INDEMNITY INSURANCE — POLICY — LIABILITY — LOSSES COVERED. An indemnity policy insuring a physician "against loss from liability imposed by law" on account of bodily injuries suffered in consequence of "malpractice, error or mistake," in the practice of his profession, covers a judgment recovered against the insured for damages for failing to remove gallstones from a patient operated upon under a contract to remove all gallstones in the body of the patient; since the judgment was a "liability imposed by law" for an error or mistake in the practice of his profession. *Sutherland v. Fidelity & Casualty Co*..... 583

3. INSURANCE—OPTION CONTRACT—APPLICATION OF INSURANCE MONEY—SPECIFIC PERFORMANCE—EQUITY. In an action for the specific performance of a contract to convey property leased with option to purchase, insurance money paid on policies written in the names of all parties interested must be applied as their interests may appear; and where a mortgagee had approved the contract and was with the vendor charged with the burden of conveying by good

Insurance—Continued.

deed, free from the mortgage, the insurance money must be credited to the vendee upon the purchase price, where the option to purchase had been exercised; since equity takes no account of a change in form or character of property. *Carnation Lumber & Shingle Co. v. Tolt Land Co.* 633

4. SAME. In such a case, the parties contracted against the rule that under a mere executory option, insurance money goes to the owner, where the contract provided that the purchaser should keep the property insured for at least $14,000 payable to the vendor as its interest may appear, and gave the purchaser the option to apply the proceeds of the policies to repairing or rebuilding. *Carnation Lumber & Shingle Co. v. Tolt Land Co.* 633

5. INSURANCE—MUTUAL BENEFIT INSURANCE—PLEADING—COMPLAINT. In an action upon a benefit certificate, the complaint is sufficient where it alleges its issuance, that it remained in full force until the death of the insured, that plaintiff was the beneficiary and had made due proofs and demanded payment, although it did not allege full compliance with all conditions. *Messick v. National Council of the Knights & Ladies of Security* 143

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In action in general, see PARTIES.

Intoxicating Liquors:

1. INTOXICATING LIQUORS — OFFENSES — UNLAWFUL POSSESSION — EVIDENCE—SUFFICIENCY. A conviction of the unlawful possession of whiskey is sustained, though accused testified it was found to be only colored water, where he obtained it from a drug store at the agreed price for whiskey, approximately the same amount of whiskey disappeared from the store, and the accused signed a confession that he got the whiskey. *State v. Seablom* 53

2. INTOXICATING LIQUORS— OFFENSES — UNLAWFUL POSSESSION — PRESUMPTION—BURDEN OF PROOF—INSTRUCTIONS. In a prosecution for unlawful possession of intoxicating liquors in excess of two quarts other than beer, the jury is properly instructed by quoting the language of the statute as to the offense, and as to the *prima facie* presumptions of guilt from the fact of possession, and that the burden of rebutting the presumption was upon the accused. *State v. Blackwell* 337

3. INTOXICATING LIQUORS—OFFENSES—SALE BY DRUGGIST—COMPLAINT —SUFFICIENCY. A complaint in justice court against a druggist for

Intoxicating Liquors—Continued.

selling intoxicating liquors in contravention of an ordinance is sufficient without alleging the name of the individual to whom the liquor was sold. *State v. Koerner*..... 516

4. INTOXICATING LIQUORS—OFFENSES — ILLEGAL PRESCRIPTIONS — GOOD FAITH—EVIDENCE OF OTHER CRIMES. In a prosecution for illegally prescribing whiskey to a patient, within such time as obviously called for more than was needed, the question of good faith being an issue under the statute, evidence of the issuance of fifty-six other prescriptions to other patients at or about the same time is admissible and is not objectionable as evidence of other crimes. *State v. Raub*..... 214

5. SAME — ILLEGAL PRESCRIPTIONS — EVIDENCE — SUFFICIENCY. In a prosecution for an illegal prescription of whiskey "without good reason to believe" that the patient was sick or required it, it is not necessary to prove the physical condition of the patient or that she did not in fact need the remedy, where it was shown that accused had theretofore prescribed whiskey for such patient in quantities which would have more than met the "directions" at the time in question. *State v. Raub*..... 214

Issuance:

Of school district warrants, see SCHOOLS AND SCHOOL DISTRICTS.

Joint Tort Feasors:

See INDEMNITY.

Judges:

Conduct of judge in criminal trial, see CRIMINAL LAW, 9-11.

Judgment:

Review in general, see APPEAL AND ERROR.
Appealability as final, see APPEAL AND ERROR, 2, 3.
On appeal, see APPEAL AND ERROR, 35-38.
Relief on cancellation of deed and rescission of trade of properties, see CANCELLATION OF INSTRUMENTS.
Collateral attack on jurisdiction to enter original order, see CONTEMPT.
On sustaining exchange of properties, see EXCHANGE OF PROPERTY.
Deficiency judgment against husband in action to foreclose mortgage as community debt, see HUSBAND AND WIFE, 6.
Right of city to recover over for judgment for injuries sustained on defective sidewalk, see INDEMNITY.
Foreclosure of mortgage, see MORTGAGES, 4.
Notwithstanding verdict, see TRIAL, 2.

1. JUDGMENT—PERSONS BOUND — PERSONS NOT BOUND — INVOLUNTARY APPEARANCE—ESTOPPEL. An appearance in response to a rule to show

Judgment—Continued.

cause why a person should not be found guilty of contempt in taking possession of property seized under the abatement statute, and a return of the property, such party not having been served and having no notice of the restraining order, is not a voluntary submission to the decree in abatement, and does not estop the party from setting up want of jurisdiction. *Simon Piano Co. v. Fairfield*..... 206

2. SAME—MERGER AND BAR—ANSWER—SET-OFF AND COUNTERCLAIM AVAILABLE IN FORMER ACTION. Rem. Code, § 264, providing that the answer "must contain' (1) a general or specific denial; (2) any new matter constituting a defense or counterclaim, which counterclaim by Id., § 265, must be one arising out of the contract or transaction set forth in the complaint or connected with the subject of the action, or, in actions on contract, any other cause arising on contract, is not mandatory in the sense of requiring the pleading of a counterclaim which is wholly unrelated to plaintiff's claim; but the two subdivisions of § 264 present merely alternatives as to unrelated claims. *Diamond Ice & Storage Co. v. Klock Produce Co.* 369

3. JUDGMENT—BAR—PLEADING—NEWLY DISCOVERED FRAUD. An action to modify or vacate former judgments between the same parties on the ground of newly discovered fraud is barred by the former decrees where the complaint contains no allegation of any new fraudulent matter occurring since, or different from, that alleged in the former causes. *Lee v. Ryzek*..... 622

4. JUDGMENT—RES JUDICATA—MERGER OR BAR—MATTERS THAT MUST BE DETERMINED. In an action for storage charges, defendants' former suits for the recovery of goods stored and for damages for goods spoiled while in storage, in which there was no counterclaim or set-off for the storage charges, are not *res judicata* of the subsequent action, since the issue for storage charges is not so closely related to the issues in the former actions as to require that it be determined therein. *Diamond Ice & Storage Co. v. Klock Produce Co.*. 369

Judicial Notice:

In civil actions, see EVIDENCE, 1.

Jurisdiction:

Appellate jurisdiction in general, see APPEAL AND ERROR, 1-3.
Of courts in bankruptcy, see BANKRUPTCY, 1.
In entry of original order as affecting liability for contempt, see CONTEMPT.
Particular courts, see COURTS.
Of courts over delinquent child, see INFANTS, 1.
Estoppel by appearance to assert want of jurisdiction, see JUDGMENT, 1.

Jury:

Instructions in criminal prosecutions, see CRIMINAL LAW, 15, 23.
Verdict in criminal prosecutions, see CRIMINAL LAW, 16, 22.
Taking case or question from jury at trial, see TRIAL, 4.
Questions for jury in civil actions, see TRIAL, 5.
Instructions in civil actions, see TRIAL, 6.

1. JURY—RIGHT TO JURY TRIAL—EQUITY. An action to rescind and cancel an exchange of land being of equitable cognizance, and a claim for damages merely incidental, it is not an abuse of discretion to refuse a jury trial, since the verdict would be merely advisory. *Reser v. Labude*..... 228

Justices of the Peace:

Amendment of complaint on appeal from, see CRIMINAL LAW, 1, 2.

Knowledge:

Effect of knowledge or means of knowledge on fraud, see FRAUD, 1.
Servant's knowledge of defect or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 8.

Laches:

In prosecuting appeal from justice court, see CRIMINAL LAW, 3.

Landlord and Tenant:

Estoppel of tenant to assert want of consideration for abrogation of lease, see ESTOPPEL, 1.
Requirements of statute of frauds as to leases, see FRAUDS, STATUTE OF, 1, 3.

1. LANDLORD AND TENANT—TENANCY FROM MONTH TO MONTH—LEASE. Possession under an unacknowledged lease for a term of years, unenforceable under the statute of frauds, creates a tenancy from month to month, under Rem. Code, § 8803, relating to tenancies for an indefinite time. *Eriksen v. Manufacturers Distributing Co...* 159

2. LANDLORD AND TENANT — LEASE — ABROGATION — EVICTION — DAMAGES. An agreement by a tenant, occupying part of a building, that a contractor might commence tearing down the building, and to vacate on a certain date, does not render the landlord or contractor liable for damages as for an eviction, when an unanticipated rain damaged the tenant's goods during the work. *Patterson v. Jordan* 200

3. SAME — LEASE — ABROGATION — CONSIDERATION. Under such an agreement where the landlord was preparing for the immediate erection of a new structure for lease to the occupants, and the contractor refused to proceed until all tenants agreed to vacate, the reciprocal surrender of rights constituted a sufficient consideration. *Patterson v. Jordan* 200

Landlord and Tenant—Continued.

4. SAME—ACTION FOR RENT—DEFENSES—EVICTION—EVIDENCE—SUFFICIENCY. In an action for rent, no eviction is shown on account of rats and vermin, where no complaint was made and no opportunity offered to remedy the matter until after the tenant had abandoned the premises. *California Building Co. v. Drury*..... 577

5. SAME. In an action for rent, no eviction is shown by reason of failure of the heating system, where no complaint was made in that regard subsequent to early in January, the rent was regularly paid for five and one-half months, and there was no evidence of failure to properly heat the building at that time, when the premises were abandoned without complaint as to the heating. *California Building Co. v. Drury*..... 577

6. LANDLORD AND TENANT—ACTION FOR RENT—DEFENSES. In an action for rent, it is no defense that the lessee had incorporated his business and made the lease for the benefit of the corporation, and claimed offsets for damages to the goods of the corporation by rats and vermin in the building; as the corporation was not a party to the lease, which required written consent to change of possession, and any oral understanding would vary the terms of the lease. *California Building Co. v. Drury*..... 577

7. SAME. In an action for rent of premises abandoned by the lessee, it is no defense that the landlord could have rented the premises to another tenant; since it had a choice of remedies and could either enter, or hold the lessee for the term; and for the same reason the lessee could not claim a credit on account of probable saving on heat and water bills for the premises to the expiration of the lease. *California Building Co. v. Drury*..... 577

8. SAME—ACTION FOR RENT—ATTORNEY'S FEES—EVIDENCE. In an action for rent, under a lease providing for attorney's fees in such an action in "the amount to be determined by the court," the court may fix the attorney's fees without taking evidence, even though the trial was to a jury. *California Building Co. v. Drury*..... 577

9. LANDLORD AND TENANT—LIEN ON CROP—NOTICE—PRIORITY—BONA FIDE PURCHASER. A landlord's lien upon crops for rent, under Rem. Code, §1190a, applying the provisions of chapter 7 relating to liens upon logs, depends upon the filing of a lien notice prior to sale to a bona fide purchaser, notwithstanding the provision that the lien may be asserted within forty days after expiration of the term or each year of the lease; since the lien may be protected by filing notice at any time. *Chute v. Brown*..... 364

Lands:

See PUBLIC LANDS.

Larceny:

Larceny by force or intimidation, see ROBBERY.

Larceny—Continued.

1. LARCENY—OWNERSHIP OF PROPERTY—EVIDENCE—INCORPORATION OF COMPANY. In a prosecution for stealing a calf alleged to belong to the S. stock company, it is not material to prove that the company was incorporated, where it was shown to be dealing in stock; hence oral evidence of its incorporation is not prejudicial. *State v. Keech* 533

2. SAME—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a conviction of stealing a calf, where its head, hide, and feet were identified, and there was evidence that it was in the possession of the defendants, who sold it to a butcher. *State v. Keech*..... 533

Law of the Road:

Instructions as to, see MUNICIPAL CORPORATIONS, 10.

Leases:

See LANDLORD AND TENANT.
Within statute of frauds, see FRAUDS, STATUTE OF, 1, 3.
Lease with option to purchase, see VENDOR AND PURCHASER, 1-5.

Leave to Sue:

On official bond, see OFFICERS.

Legislative Power:

Delegation of, see CONSTITUTIONAL LAW, 1.

Levy:

Of execution, see EXECUTION.

Licenses:

Practicing dentistry without license, see PHYSICIANS AND SURGEONS.

Liens:

Upon land for share of crops, see EXCHANGE OF PROPERTY.
Landlord's lien for rent, see LANDLORD AND TENANT, 9.
Priorities between mechanic's lien and other liens and claims, see MECHANICS' LIENS, 1, 2.

Lights:

Failure of pile-driver to display light as negligence *per se*, see COLLISION, 1.

Limitation:

Of amount affecting jurisdiction of courts, see APPEAL AND ERROR, 1.
Extension of time for payment on affirmance of judgment on appeal, see APPEAL AND ERROR, 36, 37.
On time for argument to jury, see CRIMINAL LAW, 13.
On number of expert witnesses to make depositions, see DEPOSITIONS.
By trustees on proxy voting by officer at stockholder's meeting, see INSURANCE, 1.

Limitation of Actions:

1. LIMITATION OF ACTIONS — NEGLIGENT CHANGE OF GRADE — ACTIONS NOT OTHERWISE PROVIDED FOR. An action for negligent injury to property from the changing of the grade of a highway is not an action for trespass, limited to three years, but falls within Rem. Code, § 165, declaring a two-year limitation on all actions not otherwise specifically provided for. *White v. King County*..... 327

2. LIMITATION OF ACTIONS — TOLLING STATUTE — ACCEPTING DEED SUBJECT TO MORTGAGE. The acceptance of a deed reciting that it was subject to a certain mortgage, which was excepted from the warranty clause, is not such an acknowledgment of the mortgage as to toll the statute of limitations and prevent the bar of the statute for another period. *Byrnes v. Payne*..... 260

3. SAME—TOLLING STATUTE—FILING CLAIM. The filing of a claim against a county within the statutory period does not toll the statute of limitations, which begins to run from the act giving rise to the action, and not from the filing of the claim. *White v. King County* 327

Liquors:

Offenses against liquor laws, see INTOXICATING LIQUORS.

Loans:

Guaranty of payment of, see GUARANTY, 2, 3.

Logs and Logging:

Review of verdict for damages for breach of contract for sale of standing timber, see APPEAL AND ERROR, 26.

Opinion evidence as to cost of logging and market value of logs, see EVIDENCE, 3.

Destruction of property from fire starting from logging engine, see NEGLIGENCE.

1. LOGS AND LOGGING—TIMBER CONTRACT—COVENANTS TO PUT IN POSSESSION—BREACH. Upon a sale of timber purchased from and standing on the land of another, with covenant that the vendee may go on the land to cut and remove the timber without let or hindrance, the vendor is bound to put the vendee in possession and is liable for damages for failure to do so, upon demand, when the owner of the land refused to allow the vendee to enter. *Sanders v. Pinney* 162

2. SAME—CONTRACT—BREACH—MEASURE OF DAMAGES. The measure of damages through failure to put a vendee in possession of land to cut and remove the timber purchased is the difference between the reasonable value of the merchantable timber sold and the cost of the cutting and placing it on the market, plus the amount agreed to be paid. *Sanders v. Pinney*..... 162

Logs and Logging—Continued.

3. LOGS AND LOGGING—SALES—ACTION FOR PRICE—EVIDENCE—MATERIALITY. In an action on a contract to pay a specified sum for all piles cut and removed, testimony as to the number of piles cut which were rejected as culls is immaterial, there being nothing in the contract requiring them to pass inspection. *Rich v. Ryan*... 474

4. SAME. In such a case, when timber was cut and removed as piling, it was to be paid for, and the meaning of the word "piles" is immaterial. *Rich v. Ryan*..... 474

5. LOGS AND LOGGING—CONTRACT—ACTION FOR BREACH—INSTRUCTIONS. Under an entire contract for the sale of timber upon two tracts of land, involving large expense in the construction of skid roads to remove any timber from either tract, it is proper to instruct that the whole contract is violated by failure to put the vendee in possession of a substantial part. *Sanders v. Pinney*..... 162

Malpractice:

Indemnity insurance, losses covered, see INSURANCE, 2.

Married Women:

See HUSBAND AND WIFE.

Master and Servant:

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EXTRA HAZARDOUS WORK—EMPLOYMENT AT "PLANT." A carpenter on the construction of a ship-building plant who, on his way to the toilet, passed near a galvanizing tank in the vicinity of his work when the tank exploded, is engaged in an "extra hazardous" employment within the industrial insurance act, and was injured at the employer's plant in the course of his employment. *Welden v. Skinner & Eddy Corporation* 243

2. MASTER AND SERVANT—INTERSTATE COMMERCE—EMPLOYERS' LIABILITY ACT. A foreman in charge of a building and bridge gang is not employed in interstate commerce, within the meaning of the Federal employers' liability act (35 Stat. 65), while he was engaged in unloading concrete tiling to be stored for future use in replacing wooden culverts, the place and time of its use being indefinite; since it did not directly and immediately tend to facilitate the movement of interstate commerce. *Morrison v. Chicago, Milwaukee & St. Paul R. Co.*..... 650

3. SAME. In such case, the fact that the tiling was part of an interstate shipment, and was being unloaded a very short time after its arrival, did not impress it with an interstate character so as to make its unloading a part of interstate transportation. *Morrison v. Chicago, Milwaukee & St. Paul R. Co.*..... 650

4. MASTER AND SERVANT — RELATION OF PARTIES — INDEPENDENT CONTRACTORS—WORKMEN'S COMPENSATION ACT. Constructing engineers,

Master and Servant—Continued.

supervising the work of putting up buildings on a percentage basis, under contract whereby they had no money invested and assumed no liability on contracts or pay-rolls in their name, although they employed laborers and paid them with the owner's money, are agents and employees and not independent contractors, so that the laborers were servants of the owners, within the industrial insurance act, Rem. Code, § 6604-1 *et seq.*, and not entitled to maintain actions at law for personal injuries at the plant. *Welden v. Skinner & Eddy Corporation*..... 243

5. MASTER AND SERVANT—INJURY TO SERVANT—NONDELEGABLE DUTIES—FELLOW SERVANTS. Where an employee was ordered into an elevator shaft to dislodge a piece of lumber, it is the nondelegable duty of the master to protect him from injury by the descent of an elevator operated by a fellow servant, and the failure of the servant outside the shaft directing the plaintiff's work to take the necessary precautions is the negligence of the master, making the law of fellow servants inapplicable. *Wolfin v. Shafer Brothers Land Co.*..... 438

6. MASTER AND SERVANT — FELLOW SERVANTS — DIFFERENT EMPLOYMENTS. Under the rule in Idaho, the driver of a mule train in a mine is not a fellow servant of a timber gang that moved timbers on another track, there being no cooperation or association to enable them to exercise mutual influence over each other. *Asbury v. Hecla Mining Co.*..... 542

7. SAME—ASSUMPTION OF RISKS—UNKNOWN DANGERS. The driver of a mule train, having no control over or knowledge of a timber truck that collided with his train, did not assume the risks. *Asbury v. Hecla Mining Co.*..... 542

8. MASTER AND SERVANT—ASSUMPTION OF RISKS—KNOWN DANGERS. An expert receiving shafting lowered into the hold of a ship and injured when the noose slipped because not clamped down, assumed the risk where he saw the particular load and knew the position of the chain was the same as on many previous loads, when he had taken precautions to avoid injury, and fully appreciated the danger, which was open and apparent. *Lundgren v. Pacific Coast Steamship Co.*..... 81

9. SAME—ASSUMPTION OF RISKS—CONTINUING WORK AFTER COMPLAINT. In such case, the fact that the foreman on complaint gave instructions to get and use strands of rope yarn to prevent the slipping, does not relieve from the rule of assumption of risks, where the directions were disobeyed when the foreman left the scene, and plaintiff continued work without relying on any promise to remedy the conditions. *Lundgren v. Pacific Coast Steamship Co.*..... 81

Master and Servant—Continued.

10. SAME—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Where an employee was ordered into an elevator shaft to dislodge a piece of lumber, it was not contributory negligence, as a matter of law, for him to enter the shaft without inquiring whether the necessary precautions had been taken to guard against the descent of an elevator which had remained stationary at one of the top floors during the work. *Wolfin v. Shafer Brothers Land Co.* 438

11. MASTER AND SERVANT—NEGLIGENCE—COLLISION IN MINE—NOTICE. There is sufficient evidence of negligence of the master in a collision between a mule train and a timber truck, where the driver of the train could not anticipate that the truck was on the track around a curve ahead of him, for months he had passed the place without encountering timber trucks, except once, when the shift boss promised him that it would not occur again, and no warning was given him. *Asbury v. Hecla Mining Co.* 542

12. MASTER AND SERVANT—RELATION—INJURY TO THIRD PERSON—QUESTION FOR JURY. Where a driver of an automobile is employed to hold himself ready to drive at all hours, the fact that he took a car to go to his supper and to return to the garage, cannot relieve him of employment as agent of the owner; the question being one for the jury, under Rem. Code, § 5562-33, relating to the liability of owners, and under the *prima facie* case made by ownership and the presumption of agency if the owner intrusts a dangerous instrumentality to another or leaves it so that another may use it. *Moore v. Roddie* 386

13. MASTER AND SERVANT — RELATION—PERSONAL INJURIES—AUTOMOBILES—LIABILITY TO THIRD PERSONS. The owners of an automobile are not liable for personal injuries to a pedestrian, struck when the car was driven by a son who had taken it for his own pleasure without permission and who was not a member of the family, and was not in any sense the agent or servant of his parents; and it is immaterial that, in the course of his rounds, he had picked up and was conveying a minor brother who was a member of the family. *Warren v. Norguard* 284

Mausoleums:

Abatement of as nuisance, see NUISANCE, 1.

Meander Lines:

As boundary in government patent, see PUBLIC LANDS.

Measure of Damages:

See DAMAGES; FRAUD, 3.

For sinking pile-driver through collision, see COLLISION, 2.

For failure to put vendee in possession of land to cut and remove timber, see LOGS AND LOGGING, 2.

Mechanics' Liens:

1. MECHANICS' LIENS — PRIORITIES — ACTUAL NOTICE OF MORTGAGE — EVIDENCE. Plaintiff, foreclosing a mechanics' lien, and notified by letter of a superior mortgage, may rely upon an abstract of title and the assurance of the county auditor that there was no such mortgage of record, as a sufficient excuse for not making the mortgagee a party to the action. *Zurfluh v. Hartman*..... 452

2. SAME — PRIORITIES — ERRONEOUS MORTGAGE — EQUITIES. Where a prior mortgage misdescribed the property upon which mechanics' liens were claimed and foreclosure started, the mortgagee is, as against the innocent lienors, charged with notice of the state of the record, and was bound to set up his mortgage by intervention in the lien foreclosure; and if the equities were equal, he must answer for the oversight as the one first in error. *Zurfluh v. Hartman* 452

3. MECHANICS' LIENS—CLAIMS—WAIVER. A clause in a contract for the rental of a donkey engine providing for payment at the time each raft of logs is sold, and if not so paid, giving the lessor the right to declare the agreement at an end, is not a waiver of the right to file a lien for unpaid rental. *Wroten v. Robbins*..... 393

Mental Anguish:

From insulting language of employee, see CARRIERS, 8.
As element of damages, see DEAD BODIES.

Merger:

Of cause of action in judgment, see JUDGMENT, 2, 4.

Method:

Of assessment of lands for highway improvement, see HIGHWAYS, 3.

Mines and Minerals:

Oil lease permitting prospecting for oil and gas as within statute of frauds, see FRAUDS, STATUTE OF, 3.
Employees engaged in mining, see MASTER AND SERVANT, 6, 7, 11.

1. MINES AND MINERALS—PARTNERSHIPS—FRAUD—ACCOUNTING. Where an equal partner in a mining claim promised to do the assessment work and his copartner relied thereon, and he defaulted and secretly obtained title for himself by having another file on the same and adjoining claims, he held all the claims in trust for his copartner, and upon a sale must account for a half interest in the proceeds. *Kittilsby v. Vevelstad*..... 126

Minors:

Custody and control of delinquent child, see INFANTS.

Misconduct:

Of trial judge, see CRIMINAL LAW, 9-11.

Misrepresentation:

See FALSE PRETENSES; FRAUD.

Affecting validity of contract for sale of land, see VENDOR AND PURCHASER, 6.

Mistake:

Constructive notice of mistake in mortgage, see MORTGAGES, 1.

Modification:

Of order for custody of delinquent child, see INFANTS, 2.

Money:

Obtaining money under false pretenses, see FALSE PRETENSES.

Evidence of possession of by accused, see ROBBERY.

Money Received:

Recovery of price paid for land, see VENDOR AND PURCHASER, 6.

Month:

Tenancy from month to month, see LANDLORD AND TENANT, 1.

Mortgages:

Upon community property, see HUSBAND AND WIFE, 6.

Acceptance of title subject to mortgage as tolling bar of statute, see LIMITATION OF ACTIONS, 2.

Priority as between mortgage and mechanic's lien, see MECHANICS' LIENS, 1, 2.

1. MORTGAGES—CONSTRUCTIVE NOTICE. That a certain addition to a town plat had no block "D," while the town plat did have, is not sufficient to charge one searching the records with notice that a recorded mortgage upon block "D" in such addition was a mistake and was intended to be upon block "D" in the original plat. *Zurfluh v. Hartman* 452

2. MORTGAGES—FAILURE TO RECORD—LOSS. Where the failure to record a mortgage deed enables the title holders to convey under a fictitious name and mortgage to an innocent party, the loss must fall upon the negligent mortgagee. *Farmers & Mechanics Bank v. Western Loan & Building Co.* 349

3. MORTGAGES — FORECLOSURE — PARTIES — REAL PARTY IN INTEREST—ASSIGNEE OF MORTGAGE. Under a written assignment of a mortgage, the assignee, which was a subsidiary corporation of the mortgagee, may sue to foreclose the mortgage as the real party in interest, since the judgment will bind the mortgagee and the defendants are entitled to all defenses they might have made against the mortgagee. *State Finance Co. v. Moore* 298

Mortgages—Continued.

4. MORTGAGES — FORECLOSURE — CONVEYANCE SUBJECT TO MORTGAGE PLEDGED AS COLLATERAL — JUDGMENT — AMOUNT. The purchasers of mortgaged property subject to the mortgage must be assumed to have deducted the amount of the mortgage from the purchase price; and upon foreclosure of the mortgage by an assignee holding the same as collateral security for less than its face, the judgment of foreclosure should be for the full amount of the mortgage debt, and not limited to the amount for which it was pledged, for the protection of the former owner of the mortgaged premises, though he had become owner of the mortgage pledged; since he conveyed the premises subject to the mortgage anticipating to be recompensed by receiving the face of the mortgage debt less the indebtedness for which it was pledged. *State Finance Co. v. Moore*..... 298

Motions:

Appealability of order denying motion to reopen case, see APPEAL AND ERROR, 2.

To dismiss appeal, see APPEAL AND ERROR, 18.

For judgment, see TRIAL, 2, 3.

Motive:

For crime, evidence of, see CRIMINAL LAW, 4.

Municipal Corporations:

Relief through public service commission from franchise provision requiring issuance of commutation tickets, see CARRIERS, 1, 2.

Health ordinances as delegation of legislative power, see CONSTITUTIONAL LAW, 1.

Health ordinances, see HEALTH, 1, 4.

Liability of person causing defects in streets to indemnify city for damages recovered by person injured, see INDEMNITY.

Discharge of surety on contractor's bond by suspension of work and payment in full before completion, see PRINCIPAL AND SURETY.

Set-off of claim against city in action to recover per centum of street railway earnings, see SET-OFF AND COUNTERCLAIM, 2.

Nature and extent of grant to street railway companies, see STREET RAILROADS, 1-3.

1. MUNICIPAL CORPORATIONS—CONTRACTS FOR STREET LIGHTING—CONSTRUCTION. A city cannot have the size of its lights reduced without consent of the company, under a contract for city lighting providing that the city shall establish the location and size of the lamps and that, when a lamp shall have been once established, it shall continue during the life of the contract, except that its position may be changed, and that new improved lamps shall be approximately the same wattage and cost as the one for which it is substituted; the intention being that the revenue of the company should not be reduced. *Puget Sound International R. Co. v. Everett* 495

Municipal Corporations—Continued.

2. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — CONTRACT. Where contractors for a street fill did not make part of the fill, which was done by a street railway company as required by its franchise, they are not entitled to pay therefor, under a contract which provided that the city engineer or board of public works shall have the right to eliminate any of the items called for in the contract, and such changes shall not constitute a claim for loss of anticipated profits. *United States Fidelity & Guaranty Co. v. American Savings Bank & Trust Co.*..... 304

3. MUNICIPAL CORPORATIONS — PUBLIC WORKS — OPERATING ASPHALT PLANT—FIXING PRICE. The city of Seattle cannot legally sell the product of its asphalt plant without an ordinance fixing the price at which it can be sold, in view of Seattle Charter, art. 4, § 18, subd. 12a, which provides that the city may "by ordinance and not otherwise" operate asphalt plants and fix the price at which such materials may be sold. *Shanstrom v. Case*..... 672

4. MUNICIPAL CORPORATIONS — TORTS — DAMAGES — ACTS IN GOVERNMENTAL CAPACITY—ENFORCING VOID ORDINANCE. A city in enforcing an invalid ordinance with respect to street railway fares, acts in its governmental capacity, and is therefore not liable to the company for losses thereby sustained pending litigation that resulted in declaring the ordinance void. *Seattle v. Puget Sound Traction, Light & Power Co.*..... 41

5. MUNICIPAL CORPORATIONS—ORDINANCES—LIABILITY TO VIOLATORS—NONENFORCEMENT—EFFECT. The nonenforcement by the police of an ordinance against coasting on a street does not make the city liable for personal injuries sustained by one who was violating the ordinance; since administrative officers have no power to modify the legislative acts of the city council. *Fluckiger v. Seattle*..... 330

6. MUNICIPAL CORPORATIONS — USE OF STREETS — AUTOMOBILES — CONTRIBUTORY NEGLIGENCE. The contributory negligence of a pedestrian, struck by an automobile driven at excessive speed, is a question for the jury, where there was evidence that she looked both ways before starting to cross the street and saw no car, and she may or may not have been at a crossing where a city ordinance gave pedestrians the right of way. *Moore v. Roddie*.....386

7. MUNICIPAL CORPORATIONS—STREETS — PERSONAL INJURIES — DEFECTIVE CROSSINGS—QUESTION FOR JURY. Whether a city was negligent in maintaining a smooth, slippery, manhole cover in the line of crossing for foot travel, is for the jury, where plaintiff, in the exercise of due care, slipped and fell upon it, and other pedestrians had fallen upon it. *Smith v. Spokane*..... 314

8. SAME—STREETS— DEFECTIVE CROSSINGS — ACTIONS — INSTRUCTIONS. Where there was no question as to the location of a manhole, alleged to be in the crossing, the court is justified in treating it as

Municipal Corporations—Continued.

an admitted fact and in instructing upon the theory that it was in the sidewalking or crossing between corners. *Smith v. Spokane*. 314

9. MUNICIPAL CORPORATIONS—USE OF STREETS—ACTIONS FOR NEGLIGENCE—PLEADING. In an action for personal injuries sustained in a collision with an automobile, a complaint, alleging that defendant was driving at an unlawful speed and pleading an ordinance fixing the speed limit at twenty miles an hour, is good as against a motion to strike or make more definite and certain; Rem. Code, § 291, providing that the court shall take judicial notice of an ordinance so pleaded. *Peterson v. Pallis*..... 180

10. SAME—USE OF STREETS — ACTIONS FOR NEGLIGENCE — INSTRUCTIONS. In an action for personal injuries sustained in a collision with an automobile, it is error to instruct that the defendant would be liable if it was found that he was driving on the wrong side of the street, where he was on the wrong side to avoid automobiles parked on the right side, and since it was not negligence *per se* to drive on the wrong side. *Peterson v. Pallis*..... 180

11. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENT FUND—WRONGFUL DIVERSION—EVIDENCE—SUFFICIENCY—BURDEN OF PROOF. A town is not liable to the holder of warrants for wrongful diversion of the local improvement fund by the payment of subsequent warrants out of order, where it is not shown that the amount paid out and diverted would have been sufficient to pay all warrants prior in time and lower in number than those upon which the action is based. *Perkins v. Sidney*..... 595

12. MUNICIPAL CORPORATIONS—WARRANTS—NEGOTIABILITY. Municipal improvement district warrants are negotiable for all purposes of title, so that an attorney in lawful possession could pass good title to bona fide pledgees as security for a loan to him, although he had no authority to dispose of them. *Marcus v. Ofner*..... 478

13. MUNICIPAL CORPORATIONS—TAXPAYERS' ACTION — INJUNCTION — ILLEGAL SALE OF ASPHALT. A taxpayer being presumptively damaged by the unlawful expenditure of public moneys, may maintain an action to enjoin the city from illegally selling the product of its asphalt plant without an ordinance fixing the price at which it may be sold. *Shanstrom v. Case*..... 672

Names:

Designation of parties in deed, see DEEDS,

Navigable Waters:

Collision between vessel and pile-driver, see COLLISION.

Navigation:

Right of navigation, see COLLISION, 3.

Negligence:

Of vessels in collision, see COLLISION.
Liability of county for acts of officer, see COUNTIES, 3.
Of cremation company in failing to keep and deliver ashes of child, see DEAD BODIES.
Joint tort feasors, see INDEMNITY.
Limitation of action for injury to property from change of grade of highway, see LIMITATION OF ACTIONS, 1.
Of employers, see MASTER AND SERVANT.
Contributory negligence of servant, see MASTER AND SERVANT, 10.
Failure to record mortgage, see MORTGAGES, 2.
Causing injuries to persons using streets, see MUNICIPAL CORPORATIONS, 6-10.
Loss of vessel, see SHIPPING.

1. NEGLIGENCE — FIRES — PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY. In an action by an adjoining owner for the loss of property destroyed by a fire starting from sparks from defendant's logging engine, there can be no recovery in the absence of any evidence of negligence in allowing the sparks to escape or in allowing the fire to spread from the immediate vicinity of the engine; especially where it appeared that there would have been no loss if the wind had not suddenly changed and jumped the fire to plaintiff's premises. *Stephens v. Mutual Lumber Co*..... 1

2. NEGLIGENCE—FIRES—LOSS OF GOODS — CONTRIBUTORY NEGLIGENCE — EVIDENCE—SUFFICIENCY. An employee in a logging camp cannot recover of the company for the loss of household goods, destroyed by a fire negligently allowed to spread, where they were experienced woodsmen, knew the danger, and had every opportunity to remove and protect their goods. *Stephens v. Mutual Lumber Co*..... 1

Negotiable Instruments:

See BILLS AND NOTES.
Improvement district warrants, see MUNICIPAL CORPORATIONS, 12.
Negotiability of school district warrants, see SCHOOL DISTRICTS, 2.

New Trial:

Review of rulings on as dependent on exceptions in lower court, see APPEAL AND ERROR, 6.
Necessity of incorporating affidavits in record, see APPEAL AND ERROR, 9-11.
Questions considered on appeal from decision on motion, see APPEAL AND ERROR, 19.
Review of discretionary ruling on motion, see APPEAL AND ERROR, 23, 24.
In criminal prosecutions, see CRIMINAL LAW, 17, 18.
In civil actions, see TRIAL, 2, 3.

Notes.

Promissory notes, see BILLS AND NOTES.

Notice:

To officers as affecting *bona fides* of corporation, see CORPORATIONS, 5.
Of lien on crops for rent, see LANDLORD AND TENANT, 9.
Defects or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 8.
Of prior mortgage, see MECHANICS' LIENS 1,.
Record of mortgage, see MORTGAGES, 1, 2.
Of abatement proceedings under "red light" law, see NUISANCE, 2, 3.

Nuisance:

Levy of execution on property in abatement proceedings under "red light" law, see EXECUTION.

1. NUISANCE — WHAT CONSTITUTES — MAUSOLEUM. An addition to a mausoleum will not be restrained as a nuisance injuriously affecting adjoining residence property merely because it is to become a permanent sepulture near a residence, when it will not by the emission of fumes or drainage affect the physical senses or health of people residing near it. *Rea v. Tacoma Mausoleum Association*..... 429

2. NUISANCE—ABATEMENT — ACTION — PARTIES — TITLE UNDER CONDITIONAL SALES CONTRACT. The "red light" or abatement law, being penal in its nature, will not be construed to authorize the seizure and sale of personal property held under a conditional sales contract, in the absence of a showing that the owner was charged with knowledge of the use of its property and given an opportunity to be heard in defense of the use to which it was put; since Rem. Code, §§ 3670, 3671, relating to conditional sales are not impliedly repealed by that act. *Simon Piano Co. v. Fairfield*..... 206

3. NUISANCE—ABATEMENT—SEIZURE OF PROPERTY — PARTIES — NOTICE. Where the vendor of property in a conditional sales contract was not made a party to abatement proceedings under the "red light" law, or given any notice of the proceedings, he is not bound by the decree and may recover the property, as if it were property sold *coram non judice*. *Simon Piano Co. v. Fairfield*..... 206

Objections:

Review as dependent on objection or exception made on trial, see APPEAL AND ERROR, 4, 5.
On criminal appeals, see CRIMINAL LAW, 19, 20.
To legality of drainage district, waiver of, see DRAINS, 1.
To assessment for highway improvement, see HIGHWAYS, 4.
To pleading in action on bond, waiver of, see OFFICERS.
To pleading, waiver of, see PLEADING, 1.

Offer:

Proposal for contract, see CONTRACTS, 1, 2.

Officers:

Corporate officers, see CORPORATIONS, 5.
Liability of county for torts, see COUNTIES, 3.
Health officers, see HEALTH, 1, 4, 5.
Nonenforcement of ordinance, liability of city, see MUNICIPAL CORPORATIONS, 5.
Receivers, see RECEIVERS.
Liability of county for torts of, see STATUTES.

1. OFFICERS—ACTION ON BOND—LEAVE TO SUE—PLEADING—WAIVER. Under Rem. Code, § 960, providing that, in an action on an official bond by a plaintiff other than the state, the defendant on motion shall be entitled to judgment of nonsuit if it does not appear from the complaint that leave to sue was first obtained, the objection is properly taken by demurrer, which answers the purpose of a motion, and is not waived by pleading over, after exceptions taken. *Hunter v. Berridge* 536

Offset:

See SET-OFF AND COUNTERCLAIM.

Opinion Evidence:

In civil actions, see EVIDENCE, 3, 4.

Option:

Application of insurance money on enforcement of option contract to convey leased property, see INSURANCE, 3, 4.
To purchase land, see VENDOR AND PURCHASER, 2-5.

Oral Contracts.

See FRAUDS, STATUTE OF, 3, 4.

Orders:

Review of appealable orders, see APPEAL AND ERROR, 2.
Disobedience of as contempt, see CONTEMPT.

Ordinances:

Health ordinances, see HEALTH, 1, 4.
Municipal ordinances, see MUNICIPAL CORPORATIONS, 3-5.

Ownership:

Of appliances forfeited to state upon use in unlawful fishing, see FISH.
Of stolen property, see LARCENY, 1.

Parent and Child:

Liability of parent for negligence of child in driving automobile, see MASTER AND SERVANT, 13.

Parol Contracts:

See FRAUDS, STATUTE OF, 3, 4.

Parol Evidence:

See FRAUDS, STATUTE OF, 3.

Particulars:

See PLEADING, 4.

Parties:

Entitled to alleged error, see APPEAL AND ERROR, 21.
Right to assert illegal payment under contract, see CONTRACTS, 5.
Designation of in deed, by fictitious name, see DEEDS.
To contempt proceeding to enforce decree for alimony, see DIVORCE, 3.
Persons affected by estoppel, see ESTOPPEL.
Rights of third persons on wrongful seizure of property, see EXECUTION.
Persons concluded by judgment, see JUDGMENT, 1.
Foreclosure of mechanics' liens, see MECHANICS' LIENS, 1.
Foreclosure of mortgages, see MORTGAGES, 3.
In action to abate nuisance under "red light" law, see NUISANCE, 2, 3.
Entitled to maintain action for appointment of receiver, see RECEIVERS, 1.

1. PARTIES—INTERVENTION—PERSONS ENTITLED. A townsite company, interested in the sale of its lots and therefore in the operation of a shingle and a sawmill that were the subject of sale, is not entitled to intervene and contest plaintiff's action to enforce specific performance of the sale. *Carnation Lumber & Shingle Co. v. Tolt Land Co.* 633

Partnership:

Fraud of partner in obtaining title to mining claim, see MINES AND MINERALS.
Appointment of receiver, see RECEIVERS, 1.

1. PARTNERSHIP—LIABILITY — FACT OF PARTNERSHIP — INSTRUCTIONS. Upon an issue as to defendant's liability as a partner, it is error to instruct that defendant would be liable if plaintiff believed, or had reason to believe, that he was held out as a partner, if no partnership in fact existed and defendant had no knowledge that he was being held out as a partner. *Lansdown v. Huff*..... 277

2. PARTNERSHIP—CONTRACT—EVIDENCE—QUESTION FOR JURY. In an action against a company in the automobile business and an individual demonstrating a car, for personal injuries sustained through negligent driving, there was sufficient evidence that the defendants were partners in the operation of the car, where it appears that the company contributed to the enterprise by furnishing a place of

Partnership—Continued.

business and advertising and printed matter, and the other contributed his time and personal and other expenses, the profits from the sale of cars being divided. *Cassutt v. Miller Co*..... 222

Patents:

For public lands, see PUBLIC LANDS.

Payment:

Extension of time for on affirmance of judgment, see APPEAL AND ERROR, 36, 37.
Of note, see BILLS AND NOTES, 2.
Of broker's commission, time for, see BROKERS, 2.
Compensation under contract, see CONTRACTS, 5, 6.
Guaranty of payment, see GUARANTY, 2, 3.
For timber cut and removed, see LOGS AND LOGGING, 4.
Compensation to contractor for public improvements, see MUNICIPAL CORPORATIONS, 2.
City warrants, see MUNICIPAL CORPORATIONS, 11.
To principal as releasing surety, see PRINCIPAL AND SURETY.
Issuance of warrants to agent in payment of claims against district, see SCHOOLS AND SCHOOL DISTRICTS, 3.
State appropriations, see STATES.
Of local assessment as condition precedent to foreclosure of tax lien, see TAXATION.
Recovery of price paid for land, see VENDOR AND PURCHASER, 6.

Performance:

Of contract, see CONTRACTS, 6.
Of contract to satisfy statute of frauds, see FRAUDS, STATUTE OF, 4.

Perpetuities:

1. PERPETUITIES—CHARITABLE BEQUESTS—IMMEDIATE GIFT. A bequest of a trust fund to establish an orphanage vests immediately, and the rule against perpetuities does not apply, where the bequest was to a trustee to invest the fund for the establishment of the home, and appointed five trustees as a managing board to have charge when, by its own accumulations or by other contributions, the fund reached a certain sum, which was to be a perpetual benefaction without condition or restriction. *In re Galland's Estate*..... 106

Personal Injuries:

Liability of county for negligence of officer, see COUNTIES, 3.
Measure of damages, see DAMAGES, 2.
Recovery over by city for amount paid on judgment, see INDEMNITY.
To employee or third person, see MASTER AND SERVANT.
To person on city street, see MUNICIPAL CORPORATIONS, 5-10.
To persons on or near street railroad tracks, see STREET RAILROADS, 5.

Personal Property:

Wrongful conversion, see TROVER AND CONVERSION.

Petition:

For establishment of highway, see HIGHWAYS, 1.

Physicians and Surgeons:

Competency as expert witnesses, see EVIDENCE, 4.
Sufficiency of information charging practicing dentistry without license, see INDICTMENT AND INFORMATION, 2.
Indemnity insurance, see INSURANCE, 2.
Illegal prescriptions for whiskey, see INTOXICATING LIQUORS, 4, 5.

1. PHYSICIANS AND SURGEONS—PRACTICING WITHOUT LICENSE—SUFFICIENCY. A conviction of practicing dentistry without a license is sustained where the accused had no license and admitted putting medicine on a patient's gums because they were sore. *State v. Austin* 63

Plant:

Injury to servant at plant of employer, see MASTER AND SERVANT, 1, 4.

Pleading:

Presumption as to amendment, see APPEAL AND ERROR, 20.
Presumptions on appeal as to rulings on pleadings, see APPEAL AND ERROR, 22.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 30.
As waiver of special appearance, see APPEARANCE, 2.
In action by trustee to recover property fraudulently conveyed, see BANKRUPTCY, 3.
Complaint for appointment of receiver, see CORPORATIONS, 6.
Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.
On benefit certificates, see INSURANCE, 5.
Complaint against druggist for unlawful sale of liquor, see INTOXICATING LIQUORS, 3.
Counterclaim available in former action, see JUDGMENT, 2.
Newly discovered fraud to vacate former judgments, see JUDGMENT, 3.
In action for injuries sustained in collision with automobile, see MUNICIPAL CORPORATIONS, 9.
In action on official bond, see OFFICERS.
In action for conversion, see TROVER AND CONVERSION.

1. PLEADING—DAMAGES—WAIVER OF OBJECTIONS. A complaint demanding general damages from the sinking of a pile-driver, not moved against for not being more specific, covers such damages as were the necessary and direct result of the sinking. *Houchen v. Oregon-Washington R. & Nav. Co.* 598

Pleading—Continued.

2. PLEADING — AMENDMENT — EFFECT. Under Rem. Code, § 304, requiring an amended pleading to be complete in itself, allegations in an original answer are waived by amended answer. *Seattle v. Puget Sound Traction, Light & Power Co*..... 41

3. PLEADING—REPLY—AMENDMENT—DISCRETION. It is discretionary, under Rem. Code, § 303, to permit amendment of the reply after the first trial of the case. *Hoffman v. Schnatterly*..... 465

4. PLEADING—BILL OF PARTICULARS—COPIES IN POSSESSION OF DEFENDANT. Defendant's demand for bill of particulars furnishing a copy of by-laws and proof of death in possession of the defendant is properly refused. *Messick v. National Council of the Knights & Ladies of Security*..... 143

5. PLEADING. A defense upon which the defendant refused to introduce any evidence must be considered as abandoned. *Henneberg v. Cook* 685

Pledges:

Pledge of mortgage as collateral, see MORTGAGES, 4.
Of improvement district warrants, see MUNICIPAL CORPORATIONS, 12.

Police Power:

Of state in fixing reasonable rates for carriers, see CARRIERS, 1.
Creation of state board of health, see HEALTH, 5.

Policy:

Of insurance, see INSURANCE, 2-5.

Polling Jury:

In criminal prosecution, see CRIMINAL LAW, 16.

Possession:

See ADVERSE POSSESSION.
Unlawful possession of liquors, see INTOXICATING LIQUORS, 1, 2.
Covenant to put vendee in possession, to cut and remove timber, see LOGS AND LOGGING, 1.
To support action for conversion, see TROVER AND CONVERSION.

Powers:

Of bank to purchase and hold stock in other corporations, see BANKS AND BANKING, 1.
Of city to pass health ordinances and create office of health commissioner, see HEALTH, 1.
Of legislature to create state board of health with authority to make final decision relating to detention of persons in quarantine, see HEALTH, 5.
Of court to modify order for custody of delinquent child, see INFANTS, 2.

Powers—Continued.

Of city to impose franchise terms and conditions for use of street, see STREET RAILROADS, 1.

Of public service commission, see STREET RAILROADS, 2.

Practice:

See APPEAL AND ERROR; APPEARANCE; CONTINUANCE; CRIMINAL LAW; PLEADING.

Prejudice:

Ground for reversal in civil actions, see APPEAL AND ERROR, 29-34.

Ground for reversal in criminal prosecution, see CRIMINAL LAW, 23.

Prescription:

Acquisition of rights, see ADVERSE POSSESSION.

Illegal prescriptions for whiskey, see INTOXICATING LIQUORS, 4, 5.

Presumptions:

As to nature of possession, see ADVERSE POSSESSION, 3.

On appeal, see APPEAL AND ERROR, 22.

As to negligence, see COLLISION, 4.

From possession of intoxicating liquor, see INTOXICATING LIQUORS, 2.

Price:

Action for price of timber cut and removed, see LOGS AND LOGGING, 3.

Necessity for ordinance fixing price for product of asphalt plant, see MUNICIPAL CORPORATIONS, 3, 13.

Principal and Agent:

See BROKERS.

Right to raise question of authority of attorney in fact, for first time on appeal, see APPEAL AND ERROR, 4.

Acts of attorney, see ATTORNEY AND CLIENT, 1.

Authority of bank officers to execute deed, see BANKS AND BANKING, 2.

Master's liability for wrongful acts or commissions of servant, see MASTER AND SERVANT, 12, 13.

Issuance of school district warrants to agent in payment of claims against district, see SCHOOLS AND SCHOOL DISTRICTS, 3.

1. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE. The authority of an agent to deliver deeds for an exchange of property is sufficiently established where the principal's subsequent acts, if not amounting to a ratification, makes the proof, as a whole, conclusive. *Rinne v. Wilson*..... 169

2. PRINCIPAL AND AGENT — AUTHORITY OF AGENT — EVIDENCE — SUFFICIENCY. An assistant purser on a boat, authorized to pay operating expenses from collections, had apparent authority to cash checks, having previously had such authority as purser, and the evidence warranting a finding that no sufficient notice of change of authority had been given. *Island Belt Steamship Co. v. J. & M. Cafe*..... 263

Principal and Surety:

Sureties on contractor's bond, see COUNTIES, 1, 2.
Contracts of guaranty, see GUARANTY, 2, 3.

1. PRINCIPAL AND SURETY — ALTERATION IN CONTRACT — RELEASE OF SURETY. A contractor's surety is prejudiced, and therefore discharged from liability to the city, where the work was suspended for an indefinite time without notice to the surety, and the full contract price paid before the work was fully completed, contrary to the terms of the contract and bond. *Everett v. Snyder*..... 445

Priorities:

Of liens for rent, see LANDLORD AND TENANT, 9.
Of mechanics' liens, see MECHANICS' LIENS, 1, 2.

Privity:

As affecting liability as guarantor, see GUARANTY, 1.

Probate:

Administration of estates of decedents, see EXECUTORS AND ADMINISTRATORS.

Process:

Motion to quash service as special appearance, see APPEARANCE.

Promissory Notes:

See BILLS AND NOTES.

Property:

Division on awarding divorce, see DIVORCE, 1.
Settlement of property rights prior to divorce, effect, see DIVORCE, 2.
Mutual exchange of, see EXCHANGE OF PROPERTY.
Seizure and forfeiture of appliances used in unlawful fishing, see FISH.
Subject to seizure and sale under "red light" law, see NUISANCE, 2, 3.

Prostitution:

Property subject to seizure and sale under "red light" law, see NUISANCE, 2, 3.

Province of Court and Jury:

In civil actions, see TRIAL, 4.

Proximate Cause:

Of loss of property by fire, see NEGLIGENCE, 1.

Proxy:

Voting proxies by officer at stockholder's meeting, see INSURANCE, 1.

Public Improvements:

By counties, see COUNTIES, 1, 2.
By cities, see MUNICIPAL CORPORATIONS, 2.

Public Lands:

1. PUBLIC LANDS—PATENTS—BOUNDARIES—SHORE LINES. The government meander of a lake is not a boundary line, and the patent conveys to the actual shore line, so as to include a peninsula that wes cut off and left outside the meander. *Schmitz v. Klee*..... 9

Public Policy:

Contracts against public policy, see CONTRACTS, 3.

Public Service Commission:

Regulation of rates for passenger fares, see CARRIERS, 1-3.
Power to abrogate provisions of railway franchise, see STREET RAILROADS, 2.

Public Works:

Sale by city of product of asphalt plant, see MUNICIPAL CORPORATIONS, 3, 13.

Quarantine:

See HEALTH.
Habeas corpus to produce person detained in quarantine, see HABEAS CORPUS.

Question for Jury:

Contributory negligence of servant, see MASTER AND SERVANT, 10.
Relation of master and servant, see MASTER AND SERVANT, 12.
In action for injury to person on city street, see MUNICIPAL CORPORATIONS, 6, 7.
In civil actions in general, see TRIAL, 5.

Railroads:

Carriage of goods and passengers, see CARRIERS.
Employees in interstate commerce, see MASTER AND SERVANT, 2, 3.
Railroads in city streets, see STREET RAILROADS.

Rates:

Regulation of passenger fares by public service commission, see CARRIERS, 1-4.
Regulation of by public service commission, see STREET RAILROADS, 2.

Ratification:

Act of married women, see HUSBAND AND WIFE, 2.

Real Estate Agents:

See BROKERS.

Real Property:

Adverse possession, see ADVERSE POSSESSION.
Effect of statute of frauds on agreement relating to real property, see FRAUDS, STATUTE OF.
Limitation of action for damages, see LIMITATION OF ACTIONS, 1.
Conveyance, see VENDOR AND PURCHASER.

Receivers:

Of corporations in general, see CORPORATIONS, 6.

1. RECEIVERS—APPOINTMENT—PARTIES ENTITLED. Copartners of a failing firm, who were vendees in a conditional sale of a logging outfit, wrongfully excluded from the possession of partnership property by the vendor, without notice, are entitled to maintain an action for the appointment of a receiver to conserve the property and wind up the partnership business. *Wroten v. Robbins*..... 393

2. RECEIVERS—COMPENSATION—ATTORNEY'S FEES. An allowance to a receiver of a logging concern of the usual pay which he could earn as a competent logging foreman, and $50 to his attorney, appear to be modest. *Wroten v. Robbins* 393

Records:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 8-16; CRIMINAL LAW, 19, 21.
Failure to record deed as affecting rights of grantee, see FRAUDULENT CONVEYANCES, 3.
Notice of prior mortgage, see MECHANICS' LIENS, 1.
Of mortgages, see MORTGAGES, 1, 2.

Red Light Law:

Abatement of disorderly houses, see NUISANCE, 2, 3.

Registration:

Of school district warrants, see SCHOOLS AND SCHOOL DISTRICTS, 1.

Regulation:

Of street railway rates for passenger fares by public service commission, see CARRIERS, 1-3.
By company as to time for keeping waiting room open, see CARRIERS, 6, 7.
Of street railway rates by public service commission, see STREET RAILROADS, 2.

Release:

Of liability against maker of note, see BILLS AND NOTES, 1.
Discharge by compromise or settlement, see COMPROMISE AND SETTLEMENT.
Liability as surety, see PRINCIPAL AND SURETY.

Relief:

On cancellation of conveyances, see CANCELLATION OF INSTRUMENTS.

Remedies:

Of vendor on breach of conditional sales contract, see SALES, 5.

Remittitur:

Power of court to vacate judgment after remittitur, see APPEAL AND ERROR, 88.

Removal of Causes:

Change of venue or place of trial, see VENUE.

Rent:

See LANDLORD AND TENANT, 4-9.
Acceptance of as waiver of default, see VENDOR AND PURCHASER, 2.

Reopening Case:

Appealability of order denying motion for, see APPEAL AND ERROR, 2.
For further evidence, see TRIAL, 1.

Repeal:

Of statute, see STATUTES.

Replevin:

Recovery of property under wrongful seizure, see EXECUTION.
Recovery of property sold under "red light" law, see NUISANCE, 3.

Reply:

Amendment of, see PLEADING, 3.

Representation:

Of corporation by officers, see CORPORATIONS, 5.
Representation of principal by agent, see PRINCIPAL AND AGENT.

Requests:

For instructions in civil actions, see TRIAL, 6.

Rescission:

Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.
Oral rescission of contract for sale of land, see FRAUDS, STATUTE OF, 4.
Right to jury trial in action to rescind exchange of land, see JURY.
Of contract for sale of land, see VENDOR AND PURCHASER, 6.

Residence:

Of parties to action as affecting venue, see VENUE.

Res Judicata:

See JUDGMENT.

Revenue:

See TAXATION.

Review:

In civil actions, see APPEAL AND ERROR.
In criminal prosecution, see CRIMINAL LAW, 19-21, 23.
In habeas corpus to produce person detained in quarantine, see HEALTH, 5.

Risks:

Assumed by employee, see MASTER AND SERVANT, 7-19.

Roads:

See HIGHWAYS.
Streets in cities, see MUNICIPAL CORPORATIONS, 5-10.

Robbery:

1. ROBBERY — EVIDENCE — POSSESSION OF MONEY — ADMISSIBILITY. Where three defendants, jointly charged with robbery, acted in concert, money found on each when arrested shortly after, is relevant, although the prosecuting witness could not identify all his money, nor any of the money found on two of them. *State v. Blackwood* 529

Sales:

Of corporate stock, see CORPORATIONS, 1-3.
Corporation as *bona fide* purchaser of leases, see CORPORATIONS, 5.
Liability of community property for debt contracted by wife, see HUSBAND AND WIFE, 1-3.
Of intoxicating liquors, see INTOXICATING LIQUORS, 3.
Of standing timber, see LOGS AND LOGGING.
By city of product of asphalt plant, see MUNICIPAL CORPORATIONS, 3, 13.
Of property held under conditional sales contract, under abatement proceedings under "red light" law, see NUISANCE, 2, 3.
Of real property, see VENDOR AND PURCHASER. ..

1. SALES—EVIDENCE—SUFFICIENCY. Upon conflicting evidence as to a conversation resulting in a sale of merchandise, the testimony of a witness that the sale was made to the defendant is sufficiently corroborated by testimony that, on objecting to sell to another for want of credit, it was agreed to charge the goods to defendant as an accommodation and to secure prompt shipment, and that they were shipped accordingly. *Simon v. Saxony Knitting Co.*..... 148

2. SALES—CONTRACT—WARRANTY—CONSTRUCTION—DAMAGES. A contract for the sale of lumber providing that "it is understood" that no

Sales—Continued.

lumber should be below a specified grade, constitutes a warranty of quality, entitling the purchaser to damages for delivery of inferior quality. *Valentine v. Nebraska Bridge Supply & Lumber Co.*..... 122

3. SALES—CONDITIONAL SALES—CONTRACTS—CONSTRUCTION. A contract to take over a stock of merchandise constitutes a conditional sales contract, where the buyers agreed to purchase the stock at a future date and meanwhile in disposing of the stock and carrying on the business, to act as agents of the sellers, who were guaranteed against loss and were entitled to hold the buyers to payment of the full purchase price, whereupon the contract "shall then become a full, complete and executed bill of sale." *Jordan v. Peek*..... 94

4. SALES — CONDITIONAL SALES — AFTER-ACQUIRED PROPERTY—TITLE—SUBSEQUENT CREDITORS. A clause in a duly recorded conditional sales contract providing that after-acquired property of the vendee shall be added and become the property of the vendor subject to the sales contract, does not, as against subsequent creditors of the vendee, pass the title to property subsequently acquired by the vendee under another conditional sales contract, notwithstanding the last vendor lost the property by failing to record its bill of sale; since the title thereto never passed to the vendee, as against the last vendor or subsequent creditors, and the first vendor was neither a subsequent purchaser, incumbrancer or creditor, within Rem Code, § 3670. *Pratt v. Scandinavian-American Bank of Seattle* 134

5. SALES — CONDITIONAL SALES — REMEDIES — ELECTION. A provision in a conditional sales contract giving the vendors the right to take over the stock and apply the proceeds on the purchase price and maintain suit for the balance, is contrary to law and to Civ. Code, S. D. § 1314, there being only a choice of remedies; and having elected to take the property, the vendors cannot recover the unpaid balance of the purchase price. *Jordan v. Peek*..... 94

Schools and School Districts:

1. SCHOOLS AND SCHOOL DISTRICTS—WARRANTS—ISSUANCE—REGISTRATION AND DELIVERY. The fact that school district warrants issued for supplies purchased, were not countersigned and registered by the auditor before delivery under Rem. Code, §§ 4554, 4557-2, does not prevent their subsequent countersigning and registration before any change in the situation of the parties, who were in the same position as though new warrants had been then issued, countersigned, registered and delivered. *Woodworth v. School District No. 2*..... 677

2. SAME—WARRANTS—TRANSFER—NEGOTIABILITY. While school district warrants issued for supplies purchased are not negotiable within the law merchant, they are negotiable in so far as the transfer of title is concerned, subject only to any defense which might have been made to the claim on which they were founded. *Woodworth v. School District No. 2*..... 677

Schools and School Districts—Continued.

3. SAME—CLAIMS AGAINST DISTRICT—PAYMENT IN WARRANTS—BONA FIDE ASSIGNEES. School district warrants issued in payment of supplies to an agent having apparent authority to make the collection, and assigned to a *bona fide* purchaser prior to any notice of want of authority, pay the indebtedness as effectually as if the payments had been in money, and requires payment of the warrants, even after notice that the agent had no authority to receive them. *Woodworth v. School District No. 2*..... 677

Secondary Evidence:

In civil actions, see EVIDENCE, 2.

Separate Estate:

Of husband or wife, see HUSBAND AND WIFE, 1-3.

Set-Off and Counterclaim:

Judgment as bar to action on set-off or counterclaim, see JUDGMENT, 2, 4.

1. SET-OFF AND COUNTERCLAIM — BUILDING CONTRACTS — PAYMENT FOR MATERIAL AGREED TO BE FURNISHED. Under a contract to do the plumbing and furnish all the materials required, at not to exceed a certain sum, an owner who paid for the materials which the contractor listed as necessary may counterclaim therefor against the balance due upon the contract. *Donaldson v. Brewster*..... 65

2. SET-OFF AND COUNTERCLAIM — DAMAGES — MATTERS NOT EMBRACED IN COMPLAINT. In an action by a city to recover two per cent of the earnings of a street railway company under its franchise, a claim for damages because of the city's enforcement of a void ordinance with respect to fares, is not a proper subject of counterclaim; since it does not relate to the subject-matter of the action or arise out of contract. *Seattle v. Puget Sound Traction, Light & Power Co.* 41

Settlement:

See COMPROMISE AND SETTLEMENT.
Effect of prior property settlement on alimony, see DIVORCE, 2.

Sheriffs and Constables:

Liability of county for torts of deputy sheriff, see COUNTIES, 3.

Shipping:

Liability for collision, see COLLISION.

1. SHIPPING—LOSS OF VESSEL—POSSESSION AND CONTROL—LIABILITY—BURDEN OF PROOF. The owner cannot recover from the charterer for the loss of a launch loaded beyond capacity through the negligence of a master, furnished by, and in full charge for, the owner;

Shipping—Continued.
and the rule casting the burden of proof upon the charterer in case of loss does not apply, since his possession was not exclusive. *Boe v. Hodgson Graham Co*..... 669

Shore Lines:
As boundary in government patent, see PUBLIC LANDS.

Sidewalks:
Right of city to recover over for judgment for injuries sustained on defective sidewalk, see INDEMNITY.

Signatures:
To petition for highway improvement, see HIGHWAYS, 1.

Special Appearance:
Special appearance, see APPEARANCE.

Specific Performance:
Application of insurance money on enforcement of option contract to convey leased property, see INSURANCE, 3, 4.
Parties entitled to intervene, see PARTIES.

Stare Decisis:
Rule of decision on appeal, see APPEAL AND ERROR, 35.

Statement:
Of case or facts for purpose of review, see APPEAL AND ERROR, 9, 10, 12-15, 18.

States:
Bankruptcy proceedings in state courts, see COURTS.
Forfeiture to state of appliances used in unlawful fishing, see FISH.
State board of health, see HEALTH, 1, 4, 5.
State as party defendant in action to enforce claim for materials furnished in construction of highway, see HIGHWAYS, 2.

1. STATES — FUNDS — COLLECTIONS FOR FIRE PROTECTION — CONSTITUTIONAL AND STATUTORY PROVISIONS. Sums paid or contracted to be paid by the state forester for fire protection, and, by Laws 1917, p. 349, to be made a lien upon the property protected and extended on the tax rolls and upon collection by county officials to be "repaid" to the state forester to be applied to the expenses incurred unless he is "reimbursed by the owner," are not "state" funds or taxes levied or collected for state purposes to be paid into the state treasury and paid out only on appropriations by the legislature, within the provisions of Const., art. 7, § 6, art. 8, § 4, or art. 11, § 15; since the act was within the police power, without the necessity of making the funds state funds, and they were not taxes levied for state purposes, but assessments laid on private lands particularly for the benefit done thereto. *State ex rel. Sherman v. Pape*..... 319

Statutes:

See FRAUDS, STATUTE OF.
Purchase by corporation of stock in other corporation, see BANKS AND BANKING, 1.
Discharge from liability on note, see BILLS AND NOTES, 1.
Control and regulation of carriers, see CARRIERS, 1, 3, 4.
Fish laws, see FISH.
Health and quarantine laws, see HEALTH.
Establishment of highways, see HIGHWAYS, 1, 2.
Liability of community for family expenses, see HUSBAND AND WIFE, 1.
Authority of trustees to permit proxy voting by officer at stockholder's meeting, see INSURANCE, 1.
Statutes of limitation, see LIMITATION OF ACTIONS, 1.
Application of workmen's compensation act, see MASTER AND SERVANT, 1, 4.
City ordinances, see MUNICIPAL CORPORATIONS, 3-5.
Collection of funds for forest fire protection, see STATES.

1. STATUTES — REPEAL BY IMPLICATION — COUNTIES — LIABILITIES — TORTS. Under the rule that repeals by implication are not favored, the general statute, Rem. Code, § 951, giving a right of action against a county to a person injured by some act or omission of the county, is not impliedly repealed by Id., § 3987, defining the duties of the sheriff, and providing that the county is not responsible for the acts of the sheriff while engaged in his official duties as defined therein. *Arishin v. King County*..... 176

Stock:

Purchase of stock in other corporations, see BANKS AND BANKING, 1.
Corporate stock, see CORPORATIONS, 1-3.
Secondary evidence as to issuance of corporate stock, see EVIDENCE, 2.

Stockholders:

Of corporations, see CORPORATIONS, 2, 4.
Proxy voting by officer at stockholder's meeting, see INSURANCE, 1.

Street Railroads:

Regulation of passenger fares by public service commission, see CARRIERS, 1-3.
Enforcing void ordinance relating to fares as act in governmental capacity, see MUNICIPAL CORPORATIONS, 4.
Set-off of claim against city in action to recover per centum of earnings under franchise, see SET-OFF AND COUNTERCLAIM, 2.

1. STREET RAILWAYS — FRANCHISES — POWER OF CITIES. Rem. Code, § 7507, providing that cities may authorize or prohibit and pre-

Street Railroads—Continued.

scribe terms for the location of street railways upon the city streets, is a specific grant of power to impose franchise terms and conditions for such use of its streets. *Seattle v. Puget Sound Traction, Light & Power Co.* 41

2. SAME—REGULATION OF RATES—POWER OF PUBLIC SERVICE COMMISSION—FRANCHISES—ABROGATION. The public service commission law, Rem. Code, § 8626-53, conferring power upon the public service commission to deal with questions of safety, efficiency, rates and service of street railway companies, does not confer power to abrogate franchise provisions theretofore imposed by cities under the authority of Rem. Code, § 7507, subd. 7. *Seattle v. Puget Sound Traction, Light & Power Co.* 41

3. SAME—DISCRIMINATION—CITY TAX. The fact that one city imposes no tax upon street railway use of its streets, does not prevent another city from doing so, on the theory that it would be unlawful discrimination. *Seattle v. Puget Sound Traction, Light & Power Co.* 41

4. STREET RAILWAYS — FRANCHISES — ACTION TO RECOVER TAX—DEFENSES. It is no defense to an action against a street railway company to recover two per cent of its earnings during the year 1916, that the company was damaged by the city's requiring the company to sell tickets under a void ordinance prior to 1915, where the company was not deprived of the right to operate under its franchises during the year 1916. *Seattle v. Puget Sound Traction, Light & Power Co.* 41

5. STREET RAILWAYS—ACCIDENTS AT CROSSINGS—AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The driver of an automobile, struck by a street car at a street intersection, was guilty of contributory negligence, notwithstanding he testified that he looked and did not see the street car, which was in full view, where he deliberately drove onto the tracks and had time to avoid the collision by stopping if he had taken notice of the street car. *Herrett v. Puget Sound Traction, Light & Power Co.* 101

Streets:

See MUNICIPAL CORPORATIONS, 5-10.

Grant of rights in street and roads to street railways, see STREET RAILROADS, 1-4.

Striking:

Statement of facts on appeal, see APPEAL AND ERROR, 13, 14, 18.

Suretyship:

See PRINCIPAL AND SURETY.

Taxation:

Assessment for drains, see DRAINS.
Assessment of expense of public improvements, see HIGHWAYS, 3, 4.
Collection of fund for fire protection as tax for state purposes, see STATES.
City tax on street railway for use of streets, see STREET RAILROADS, 3.

1. TAXATION—FORECLOSURE OF CERTIFICATES—CONDITION PRECEDENT—PAYMENT OF LOCAL ASSESSMENTS. Rem. Code, § 7892-40, requiring the private owner of certificates of delinquency to pay in full all local assessments against the property, or acquire title subject thereto, before commencing action to foreclose the prior lien of the general tax, is a valid enactment that must be complied with. *Lawrence v. Tacoma*..... 86

Tender:

Of purchase price by vendee, see VENDOR AND PURCHASER, 3, 5.

Terms:

Of leases, see LANDLORD AND TENANT, 1.

Timber:

Contracts for sale of, see LOGS AND LOGGING.

Time:

For motion to dismiss appeal, see APPEAL AND ERROR, 18.
Extension of time for payment on affirmance of judgment, see APPEAL AND ERROR, 36, 37.
For payment of broker's commission, see BROKERS, 2.
For filing notice of lien on crops for rent, see LANDLORD AND TENANT, 9.

Title:

Color of title, see ADVERSE POSSESSION.
Of contempt proceeding to enforce decree for alimony, see DIVORCE, 3.
Estoppel of grantee to assert title, see FRAUDULENT CONVEYANCES, 3.
Impeachment by declarations of grantor showing fraudulent intent, see FRAUDULENT CONVEYANCES, 4.
To after-acquired property of vendee in conditional sales contract, see SALES, 4.
Title to support trover, see TROVER AND CONVERSION.
Of vendor, see VENDOR AND PURCHASER, 1.

Tolling:

Statute of limitations, see LIMITATION OF ACTIONS, 2, 3.

Torts:

See FRAUD; NEGLIGENCE; NUISANCE; TROVER AND CONVERSION.
Maritime torts, see COLLISIONS.
By counties, see COUNTIES, 3.

Torts—Continued.

Measure of damages, see DAMAGES, 2.
Of employers, see MASTER AND SERVANT, 1-11.
Injuries by employees, see MASTER AND SERVANT, 12, 13.
Of cities, see MUNICIPAL CORPORATIONS, 4.
Of partners, see PARTNERSHIP, 2.
Implied repeal of statute giving right of action against county for torts, see STATUTES.
Injuries caused by operation of street cars, see STREET RAILROADS, 5.

Transcripts:

Of record for purpose of review, see APPEAL AND ERROR, 8-16.

Trespass:

Limitation of action for damages from change of grade, see LIMITATION OF ACTIONS, 1.

Trial:

Review of ruling as dependent on presentation of objection or exception in lower court, see APPEAL AND ERROR, 4-7.
Review of rulings as dependent on presentation of same by record, see APPEAL AND ERROR, 8-16.
Review of discretionary action, see APPEAL AND ERROR, 23, 24.
Review of findings in trial by court, see APPEAL AND ERROR, 25, 27, 28.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 29-34.
Instructions in action for damages from collision, see COLLISION, 1, 3, 4.
Continuance in civil actions, see CONTINUANCE.
In criminal prosecutions, see CRIMINAL LAW.
Instructions in action on note given for debt contracted by wife, see HUSBAND AND WIFE, 3.
Instructions in prosecution for unlawful possession of liquor, see INTOXICATING LIQUORS, 2.
Right to trial by jury, see JURY.
Instructions in action for breach of contract for sale of timber, see LOGS AND LOGGING, 5.
Instructions in action for injury to person on city street, see MUNICIPAL CORPORATIONS, 8, 10.
Instructions as to liability as partner, see PARTNERSHIP, 1.
Amendment of pleading during trial, see PLEADING, 3.
Instructions in action for rescission by vendee, see VENDOR AND PURCHASER, 6.
Place of trial, see VENUE.
Attendance and examination of witnesses, see WITNESSES.

1. TRIAL—REOPENING CASE—DISCRETION. It is not an abuse of discretion to refuse to reopen a case for further evidence where it had been pending many years and had been previously once tried. *Perkins v. Sidney* 595

Trial—Continued.

2. TRIAL—MOTION FOR JUDGMENT—NEW TRIAL. Motions for judgment notwithstanding a verdict or for a new trial should not be granted where reasonable minds might reach different conclusions upon the evidence. *Norris-Short Co. v. Everson Mercantile Co*..... 399

3. TRIAL—MOTION FOR JUDGMENT—NEW TRIAL. Where one of two defendants jointly liable had been improperly dismissed, upon verdict against the other, there cannot be a judgment against such defendant without verdict, but only a new trial. *Cassutt v. Miller Co.* 222

4. TRIAL—PROVINCE OF COURT AND JURY—DIRECTING VERDICT—BILLS AND NOTES. In an action on notes, where it was shown that the plaintiff was a holder in due course, and defendants failed to introduce any evidence showing that plaintiff purchased after maturity or had notice of any defense, there was no question for the jury, and the court properly directed verdict for the plaintiff. *Stevens v. Selvidge*..... 683

5. TRIAL—QUESTION OF FACT. The weight and credibility of the testimony of interested witnesses upon disputed contradictory facts is for the jury where reasonable minds might differ. *Moore v. Roddie* 386

6. TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions which are covered in the general charge. *Lundy v. Bend Park Co*..... 695

Trial By Jury:

See JURY.

Trover and Conversion:

1. TROVER AND CONVERSION—COMPLAINT—TITLE OF PLAINTIFF. A complaint alleging that, after plaintiff's sale and delivery of chattels to a third party, the defendants converted them to their own use, does not state a cause of action for conversion, since the plaintiff had no title or right of possession. *Lee v. Ryzek*..... 622

Trustees:

Trustees in bankruptcy, see BANKRUPTCY.

Authority to limit proxy voting by officer at stockholder's meeting, see INSURANCE, 1.

Trusts:

Fraud of partner in obtaining title to mining claim, see MINES AND MINERALS.

Charitable bequests in trust, see PERPETUITIES.

Unlawful Detainer.

Authority of attorney to begin suit, see ATTORNEY AND CLIENT, 1.

Vacation:

Of judgment after remand, see APPEAL AND ERROR, 38.
Bar of action to vacate judgment for newly discovered fraud, see JUDGMENT, 3.

Valuation:

Of street railway system as condition precedent to fixing fares by public service commission, see CARRIERS, 3.

Value:

Limits of jurisdiction, see APPEAL AND ERROR, 1.
Opinion evidence as to value of property, see EVIDENCE, 3.
Opinion evidence as to value of medical services, see EVIDENCE, 4.

Vendor and Purchaser:

See EXCHANGE OF PROPERTY.
False representations in sale of land, see FRAUD, 1.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 4.
Transfer of mortgaged property, see MORTGAGES, 4.
Transfers of ownership of personal property, see SALES.

1. VENDOR AND PURCHASER—OPTION CONTRACT—TITLE—APPROVAL BY MORTGAGEE—CONSTRUCTION. Where lumber and shingle mill property, mortgaged to a bank for $23,177.50, was leased at $300 per month, with option to purchase by warranty deed for $18,750 if taken within two years, or for $14,000 if taken in eighteen months, and the bank, which was a party to the negotiations, made indorsement on the contract that it "ratified, confirmed and approved" all of the terms of the agreement, rent being paid to the bank, the effect of the contract and indorsement was to charge the vendor and the bank with the burden of conveying by good and sufficient deed, free of the mortgage, if the option to purchase were exercised. *Carnation Lumber & Shingle Co. v. Tolt Land Co.*..... 633

2. VENDOR AND PURCHASER—LEASE AND OPTION CONTRACT—FORFEITURE—WAIVER. Acceptance of rent for a specified month, under a lease containing an option to purchase, is a waiver of any prior default as ground for forfeiting the contract. *Carnation Lumber & Shingle Co. v. Tolt Land Co.*..... 633

3. SAME—OPTION CONTRACT—FORFEITURE. An attempted forfeiture of a lease and option to purchase after tender of the purchase price is futile. *Carnation Lumber & Shingle Co. v. Tolt Land Co.*..... 633

4. SAME—LEASE AND OPTION CONTRACT—ABANDONMENT. Evidence of intent by the lessee to abandon property leased with option to purchase cannot be gathered from the conduct of the vendor and third persons. *Carnation Lumber & Shingle Co. v. Tolt Land Co.* 633

Vendor and Purchaser—Continued.

5. VENDOR AND PURCHASER—TENDER. A tender of the sum due upon exercising an option to purchase leased land may demand that infirmities in the title disclosed by the abstract be cleared to comply with the vendor's contract to convey a good title. *Carnation Lumber & Shingle Co. v. Tolt Land Co.*..... 633

6. VENDOR AND PURCHASER—REMEDIES OF VENDEE—RECOVERY OF PURCHASE MONEY—INSTRUCTIONS. In an action to rescind a sale of real property and recover purchase money, an instruction that the written contracts contained warnings against oral representations not contained in its authorized literature are properly refused, where it appears that such literature was not generally obtainable at the time, and such as was obtainable contained the false representations. *Lundy v. Bend Park Co.*..... 695

Venue:

1. VENUE—RESIDENCE OF DEFENDANT—RIGHT TO CHANGE—CODEFENDANTS. Where a change of venue to the county of the defendant's residence, upon a showing that codefendants were joined merely for the purpose of retaining venue, was denied with leave to renew the motion if at the trial no relief is claimed against the other defendants, defendant is entitled to the change of venue, after appeal and remand, where the codefendants had absconded or were insolvent and had been eliminated by the judgment without the trial of any real issue, leaving the real controversy to be tried out against him as sole defendant. *State ex rel. Keyes v. Superior Court*.... 402

Verdict:

Review on appeal or writ of error, see APPEAL AND ERROR, 26.
In criminal prosecutions, see CRIMINAL LAW, 16, 22.
Excessive damages, see DAMAGES, 2.
Judgment notwithstanding verdict, see TRIAL, 2.
Directing verdict in civil actions, see TRIAL, 4.

Verification:

Of informations, see INDICTMENT AND INFORMATION, 1.

Vessels:

Liability of charterer for loss of, see SHIPPING.

Voting:

Proxy voting by officer at stockholder's meeting, see INSURANCE, 1.

Waiver:

See ESTOPPEL.
Of special appearance by pleading over, see APPEARANCE, 2.
Of objections to legality of drainage district, see DRAINS, 1.
Of mechanic's lien, see MECHANIC'S LIENS, 3.
Of objections to pleading, in action on official bond, see OFFICERS.

Waiver—Continued.

Of objections to pleading, see PLEADING, 1.
By amendment of pleading, see PLEADING, 2.
Of forfeiture by vendor, see VENDOR AND PURCHASER, 2.

Warrants:

Orders for payment from public fund, see MUNICIPAL CORPORATIONS, 11, 12.
School warrants, see SCHOOLS AND SCHOOL DISTRICTS.

Warranty:

Covenants of, see COVENANTS.
On sale of goods, see SALES, 2.

Waters and Water Courses:

Provision in drainage district law for special assessment without review as denial of due process of law, see CONSTITUTIONAL LAW, 2.
Establishment of drainage district, see DRAINS.

Wills:

Charitable bequests, see PERPETUITIES.

Witnesses:

Absence of witnesses as ground for continuance, see CONTINUANCE, 1.
Absence of as ground for continuance, see CRIMINAL LAW, 8.
Right of accused to confront witnesses, see CRIMINAL LAW, 12.
Instructions as to credibility, see CRIMINAL LAW, 15, 22.
Limiting number of, see DEPOSITIONS.
Opinions, see EVIDENCE, 3, 4.

1. WITNESSES—CROSS-EXAMINATION—SCOPE. In an action for a balance due for piling cut from plaintiff's land, in which plaintiff, on direct examination, testified as to the number of piles in a certain raft, but on cross-examination testified that part of them came from other land than his, it is proper to ask whether he knew how many piles came from other land; since it is a matter of right to cross-examine as to facts in issue testified to by a witness. *Rich v. Ryan* 474

2. WITNESSES—IMPEACHMENT. Upon an offer to impeach the plaintiff's testimony as to a letter which she claimed was written by an insurance agent in her presence on May 20, a letter written on May 22d not in her presence is inadmissible. *Peery v. London Assurance Corporation* 62

3. WITNESSES—CROSS-EXAMINATION—IMPEACHMENT. Where, at the time of a robbery, the prosecuting witness was told that defendants belonged to the I. W. W., it is proper cross-examination of a defendant who denied commission of the offense to ask if he belonged to the I. W. W. *State v. Blackwood* 529

Witnesses—Continued.

4. WITNESSES—CROSS-EXAMINATION—CREDIBILITY. Where defendant, accused of practicing dentistry without a license, testified on cross-examination that he had never done any dental work himself, it is proper as testing his credibility to ask if he had not done dental work for certain named persons. *State v. Austin*..... 63

5. SAME—CROSS-EXAMINATION—CREDIBILITY. In a prosecution for robbery by defendants claiming to belong to the I. W. W., it is proper cross-examination of defendant's witnesses to ask if they belonged to the I. W. W., as bearing on their interest in the defendants and affecting their credibility. *State v. Blackwood*.... 529

6. WITNESSES—IMPEACHMENT—EFFECT OF USE OF DRUGS... In a prosecution for selling morphine without a physician's prescription, where the prosecuting witness, a sporting woman, was under the influence of morphine at the time of the sale and of her accusation, the defense is entitled to prove by expert testimony the effect of the drug upon her mind and memory. *State v. Smith*..... 267

7. WITNESSES — IMPEACHMENT — COLLATERAL MATTER — CREDIBILITY—CORROBORATION. In a prosecution for murder, in which the whereabouts of a certain witness at a certain time was material and in direct conflict, the witness having denied upon cross-examination that she had then gone to her barber shop and had been spoken to by a policeman, her impeachment by the policeman in rebuttal is not upon a collateral matter and is proper upon the issuable circumstance and her credibility, and to sustain the credibility of witnesses contradicting her. *State v. Hood*..... 489

Woods and Forests:

Contracts for sale of timber, see LOGS AND LOGGING.
Collection of funds for fire protection, see STATES.

Work and Labor:

Liens for work and materials, see MECHANICS' LIENS.

Workmen's Compensation Act:

See MASTER AND SERVANT, 1, 4.

Writs:

See HABEAS CORPUS.

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